No. 11035

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JIM JUNG and MARTY SHERMAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

INDEX TO EXHIBITS.

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

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For Appellee:

H. EUGENE BREITENBACH
WM. U. HANDY
STANLEY JEWELL
ARLINE MARTIN
1031 South Broadway
Los Angeles 15, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California
Central Division

No. 3560-O'C Civil

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

JIM JUNG, MARTY SHERMAN and MARVIN BERRY, individually and doing business as VICTORY PRODUCE COMPANY,

Defendants.

AMENDED COMPLAINT FOR TREBLE DAMAGES

1. Plaintiff, as Administrator of the Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act of 1942 (Public Law 421, 77th Cong. 2d Sess., 56 Stat. 23) enacted January 30, 1942, hereinafter called "the Act."

2. Jurisdiction of this action is conferred upon this Court by Section 205 (c) of the Act and by said Section 205 (e) of the Act.

3. At all times mentioned herein there was in effect, pursuant to the Act, Maximum Price Regulation 271, as amended, Certain Perishable Food Commodities, Sales Ex-

cept at Retail, (7 Fed. Reg. 9179) establishing a maximum price for each variety and grade of early white potatoes, 1943 crop. [2]

4. At all times mentioned herein defendants Jim Jung, Marty Sherman and Marvin Berry were copartners doing business as Victory Produce Company, with the principal place of business located at 1124 South San Julian Street, Los Angeles, California, and were intermediate sellers of early white potatoes, selling to other intermediate sellers and retailers within the meaning of the provisions of Section 1351.1003 of Maximum Price Regulation 271, as amended.

5. From and including April 12, 1943, more than six months after the date of approval and enactment of the Act, to and including May 27, 1943, the defendants, and each of them, as intermediate sellers, sold and delivered early white potatoes, 1943 crop, in one hundred pound sacks to wholesalers and retailers. None of said purchases was made for use or consumption other than in the course of trade or business. The defendants, and each of them, demanded and received a price or consideration for the sale of each one hundred pound sack of said early white potatoes, 1943 crop, in excess of the maximum price established for sales of said potatoes by intermediate sellers, under the provisions of Maximum Price Regulation 271, as amended.

6. Three times the aggregate amount by which the price received by the defendants, and each of them, referred to in paragraph 5 above, exceeded the maximum

price provided by Maximum Price Regulation 271, as amended, equals Twenty-Nine Thousand Three Hundred Twenty-Three Dollars and Fifty Cents ($29,323.50).

Wherefore, Plaintiff demands:

1. Judgment on behalf of the United States against the defendants, and each of them in the sum of Twenty-Nine Thousand Three Hundred Twenty-Three Dollars and Fifty Cents ($29,323.50);
2. For costs of suit herein; and
3. For such other and further relief as the Court [3] deems just and proper.

Signed at Los Angeles, California, this 13th day of April, 1944.

H. EUGENE BREITENBACH
ROGER E. JOHNSON
STANLEY JEWELL
ARLINE MARTIN
Attorneys for Plaintiff

Office of Price Administration
1031 South Broadway
Los Angeles 15, California

[Endorsed]: Filed Apr. 13, 1944. [4]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now the defendants and each of them, in answer to the plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

Answering paragraphs 1, 2, and 3 of plaintiff's complaint, defendants and each of them deny generally and specifically each and every allegation contained therein and the whole thereof.

II.

Answering paragraph 4 of plaintiff's complaint on file herein, deny that they and each of them were intermediate sellers of early white potatoes within the meaning of the provisions of Section 1351.1003 of Maximum Price Regulation 271, as amended. [11]

III.

Answering paragraphs 5 and 6, deny generally and specifically each and every allegation contained therein and the whole thereof.

Wherefore, defendants and each of them pray that plaintiff's complaint on file herein be dismissed, for costs of suit involved herein, and for such other and further relief as to this Court may seem meet and proper in the premises.

LOUIS LERNER,
Attorney for Defendants.

[Verified.]

[Endorsed]: Filed Aug. 24, 1944. [12]

[Title of District Court and Cause.]

H. Eugene Breitenbach, Roger E. Johnson, Stanley Jewell, Arline Martin, Attorneys for Plaintiff—1031 S. Broadway, Los Angeles 15, California,

Louis Lerner, Attorney for Defendants, 210 W. 7th St., Los Angeles 14, Calif.

O'Connor, J. F. T., Judge.

MEMORANDUM DECISION

The court finds that each and all of the 100-pound sacks of potatoes, as set forth in the plaintiff's exhibit 2, were sold in violation of the ceiling prices as alleged in the amended complaint, and the total overcharges were as set forth in the plaintiff's exhibit 2. The court finds for the defendants for all 50-pound sacks of potatoes as set forth in plaintiff's exhibit 2, as there was no allegation in the amended complaint charging defendants with ceiling price violations in the sale of the 50-pound sacks of potatoes.

There was no evidence introduced to show that the violations of the regulations for price schedule were wilful, or the result of [49] failure to take practical precautions against the occurrence of the violations, and therefore, the amount of the judgment shall be the amount of the overcharges as set forth in plaintiff's exhibit 2.

While three members of the partnership, Jim Jung, Marty Sherman, and Marvin Berry were named defendants individually and as doing business as Victory Produce Company, the record shows Marvin Berry was not personally served. The other two partners were personally served and appeared in the action, answered, and were represented by counsel. Judgment, therefore, will be entered only against the two partners named: Jim Jung and Marty Sherman, and no judgment will be entered against Marvin Berry, who was not served with process.

While counsel for the two defendants against whom judgment is ordered appeared and answered for all of the defendants by stipulation agreeable to the plaintiff, counsel withdrew his appearance for Marvin Berry prior to the trial.

Plaintiff will prepare Findings of Fact, Conclusions of Law, and Judgment in accordance with this memorandum decision, within ten days from the date hereof.

Dated November 14, 1944.

J. F. T. O'CONNOR
Judge

[Endorsed]: Filed Nov. 14, 1944. [50]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on Wednesday, November 1, 1944, before the Honorable J. F. T. O'Connor, judge presiding, sitting without a jury, a jury having been expressly waived, Arline Martin and Wm. U. Handy appearing for Plaintiff and Louis Lerner appearing for Defendants Jim Jung and Marty Sherman individually and doing business as Victory Produce Company, and oral and documentary evidence having been produced and introduced on behalf of both parties and the cause having been submitted, and the Court being fully advised in the premises makes the following:

FINDINGS OF FACT

I.

The allegations contained in Paragraphs 1, 2, 3, 4 and 5 of Plaintiff's complaint are true. [51]

II.

It is true that the exact amount by which the price received by the Defendants and each of them for the sale of early white potatoes, 1943 crop, in one hundred (100) pound sacks to wholesalers and retailers from and including April 12, 1943 to and including May 27, 1943, exceeded the maximum price provided by Maximum Price Regulation 271, as amended, is Eight Thousand Nine Hundred and Sixty-five Dollars and Seventy-eight cents ($8,965.78).

III.

It is true that the sales of potatoes in excess of the maximum price by Defendants as found in Paragraph II hereof were made by the Defendants in good faith and the Defendants took all practicable precautions to avoid making said sales at prices in excess of the maximum price.

From the foregoing facts the Court makes the following:

CONCLUSIONS OF LAW

I.

Plaintiff is entitled to judgment against the Defendants Jim Jung and Marty Sherman jointly in the sum of Five Thousand Nine Hundred and Seventy-seven Dollars and Eighteen cents ($5,977.18).

Dated this 14 day of December, 1944.

J. F. T. O'CONNOR
United States District Judge [52]

Received copy of the within Findings of Fact and Conclusions of Law this 24 day of November, 1944. Louis Lerner, by Abraham Goldstein, Attorney for Defendants.

[Endorsed]: Filed Dec. 14, 1944. [53]

In the District Court of the United States
Southern District of California
Central Division

No. 3560-O'C

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

JIM JUNG, MARTY SHERMAN and MARVIN BERRY, individually and doing business as VICTORY PRODUCE COMPANY,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on November 1, 1944, in the above entitled Court, before the Honorable J. F. T. O'Connor, judge presiding, sitting without a jury, a jury having been expressly waived. Arline Martin and Wm. U. Handy appearing as attorneys for Plaintiff and Louis Lerner appearing as attorney for Defendants Jim Jung and Marty Sherman, individually and doing business as Victory Produce Company and evidence both oral and documentary having been introduced and the cause submitted for decision and the Court having heretofore made and caused to be filed its written findings of fact and conclusions of law.

It Is Ordered, Adjudged and Decreed that Plaintiff recover from [54] Defendants Jim Jung and Marty Sher-

man jointly, the sum of Five Thousand Nine Hundred and Seventy-seven Dollars and Eighteen cents ($5,977.18).

Costs taxed at $40.54.

Dated this 14 day of December, 1944.

J. F. T. O'CONNOR
United States District Judge

Judgment entered Dec. 14, 1944. Docketed Dec. 14, 1944. Book C O 29, page 515. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy. [55]

Received copy of the within Judgment on this 24 day of November, 1944. Louis Lerner, by Abraham Goldstein, Attorney for Defendant.

[Endorsed]: Filed Dec. 14, 1944. [56]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that defendants Jim Jung and Marty Sherman hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 14, 1944.

Dated: March 9, 1945.

EDWARD M. RASKIN & LOUIS LERNER
By Edward M. Raskin
Attorneys for Appellants Jim Jung and Marty Sherman

[Endorsed]: Filed & mailed copy to H. Eugene Breitenbach. Wm. U. Handy, Stanley Jewell. & Arline Martin, plfs. attys- Mar. 9, 1945. [63]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 70 inclusive contain full, true and correct copies of Amended Complaint for Treble Damages; Notice of Motion to Make Complaint More Definite and Certain or for Bill of Particulars; Minute Order Entered July 24, 1944; Answer to Amended Complaint; Plaintiff's Exhibits Nos. 1 and 2; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Motion for New Trial; Minute Order Entered January 11, 1945; Substitution of Attorneys; Notice of Appeal; Designation of Portions of Record to be Contained in Record on Appeal; Supplemental Designation of Portions of Record to be Contained in Record on Appeal and Undertaking for Costs on Appeal which, together with copy of Reporter's Transcript transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $22.85 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 10th day of April, 1945.

[Seal] EDMUND L. SMITH,
Clerk

By Theodore Hocke
Chief Deputy Clerk.

[Title of District Court and Cause.]

Before the Honorable J. F. T. O'Connor

REPORTER'S TRANSCRIPT OF PROCEEDINGS [1*]

Los Angeles, California, Wednesday, November 1, 1944. 10:00 A. M.

Miss Marten: Your Honor, just to bring us up to date on this matter, since the time we discussed it on the pre-trial, we have filed here a cause of action for treble damages, based upon Section 205 (e) of the Emergency Price Control Act, for the sale, in substance, of early white potatoes during the period from April 12, 1943, to May 27, 1943.

Our principal points of issue on the facts involve the question of what was the correct ceiling cost to defendants of the potatoes. In that cost is included the cost of transportation from the point of origin of the potatoes to the defendants' place of business in Los Angeles; that would be from Edison, in Kern County, or Bakersfield, California, to Los Angeles, California. We expect to prove that the ceiling price for trucking potatoes from that area at that time was 18 cents per hundredweight.

The next question of fact is, What is the ceiling price at which defendants can resell potatoes, under the regulations? That price is calculated by the defendants by picking out the net cost of their largest single purchase of each grade of potatoes during the preceding week, and applying the mark-up to which they are entitled to the intermediate sellers, under the regulation, for their profit. So we will be offering evidence this morning showing the

*Page number appearing at top of Reporter's Transcript.

ceiling price of potatoes, the method by which the potatoes [2] are hauled, and evidence of the correct ceiling prices of the defendants for resale of the potatoes, and evidence of the prices at which the potatoes were actually sold.

Mr. Lerner: In order that we understand clearly the evidence which is going to be presented to the Court, I feel that we are at a difference as to exactly what constitutes the issue, and what the evidence is going to prove. The plaintiff, in her opening statement, makes the statement that they are going to show what the maximum price ceiling was, or should have been for the defendants. I might point out, if your Honor please, that the statement itself of the plaintiff's counsel, that they intend to show the price of freight, intend to show the calculated price includes freight, is not in itself in accordance with the maximum price regulation, and before we proceed with the introduction of evidence it is necessary to determine under what provision of the statute we come, and whether or not the calculations or attempted evidence on the part of the plaintiff, are within the regulation to which they are attempting to hold the defendants. Furthermore, I think it should also be clarified as to who are the defendants by whom such sales were made, before we can determine whether or not there was a violation.

The Court: I can't determine those questions until I hear the evidence.

Mr. Lerner: I appreciate that, your Honor. We had [3] that same question come up in the pre-trial. I merely want to make that opening statement so that when objections are raised the Court will understand the purpose for which the objections are being made.

The Court: It is perfectly proper for counsel to make the statement. It protects the record.

GEORGE M. MYERS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

A. George M. Myers.

Direct Examination

By Miss Marten:

Q. Mr. Myers, what is your occupation?

A. I am rate clerk for the Southern Pacific, in the general freight office, in Los Angeles.

Q. How long have you been employed in that capacity? A. About 20 years.

Q. And do you have with you this morning the tariff or freight rate from Bakersfield, Kern County, to Los Angeles? A. Yes.

Q. Can you tell us what your freight was in April and May, 1943, per car of potatoes, from Bakersfield, Edison, Wasco, and vicinity, to Los Angeles, California?

Mr. Lerner: I object to the question upon the ground [4] that it is immaterial what the freight rates were.

The Court: Overruled. Exception allowed.

Miss Marten: Will you answer the question, Mr. Myers?

A. The rate by rail for that period was constant, and was, from Bakersfield, McKittrick, Arvin, as well as Edison, 15 cents per 100 pounds.

Q. Can you tell us what would be the cost for icing a car of potatoes under Rule 240?

A. Rule 240—I presume you refer to the perishable protective tariff—Rule 240 means initial icing, and no reicing. The charge there is dependent upon the instruc-

(Testimony of George M. Myers)

tions of the shipper, or the amount of ice to be placed in the bunkers of the car. If his request involves the placing of approximately five and a half tons of ice in the bunkers of the car, the cost of that ice is $3.05 a ton, which would mean $20.50 for the ice.

Q. Is there any additional charge per car? A. Yes, sir, the haulage charge is $7.50.

Q. Which makes a total of $28.00 to the market?

A. That is incorrect. It should be $15.77.

Q. Five and a half tons at $3.05 per ton? A. Yes; plus the hauling charge, would make a total charge of $24.27 for the icing service.

A. If a car of potatoes contained 450 sacks, weighing 100 pounds each, in addition to the 15 cent freight rate, how much per sack would be added on for icing? [5]

Mr. Lerner: If your Honor please, I am going to object to the hypothetical question, on the ground that no foundation has been laid; no showing that it relates or has any identical comparison with the facts before the Court. Upon the further ground that there have been insufficient facts before the Court to establish a hypothetical case.

Miss Marten: I will withdraw the question. That is all for the plaintiff.

Cross Examination

By Mr. Lerner:

Q. Mr. Myers, what were you reading from? What is that volume you have?

A. The tariff containing freight charges: Southern Pacific tariff 817 e, CPC 3776.

(Testimony of George M. Myers)

Q. Is that the tariff that was in effect on or about April, 1943?

A. The particular rates at issue were effective in this publication October 3, 1941, and are still in effect. There has been no change in the interim.

Q. Do you have any knowledge as to whether or not there were any freight cars available during the two months in question? A. No, I do not.

Mr. Lerner: No further questions. [6]

RUBEN KUNDERT,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

A. Ruben Kundert.

Direct Examination

By Miss Marten:

Q. What is your address, Mr. Kundert?

A. 1915 18th Street, Bakersfield.

Q. What is your business or occupation?

A. Transportation.

Q. Will you describe that? Are you a trucker?

A. Yes, a trucker.

Q. In April and May, 1943, were you engaged in the trucking business? A. Yes.

Q. Under what name did you carry on that business?

A. Edison Trucking Company.

Q. For whom did you truck potatoes in April and May, 1943, if you can remember?

A. I trucked for Marvin Berry, Enos Moser, L. A. Potato, and others—a lot of them.

(Testimony of Ruben Kundert)

Q. Referring to the potatoes which you trucked for Marvin Berry, did you have any arrangement with Mr. Berry as to the price for which you would truck potatoes for him? [7]

Mr. Lerner: I object to the question upon the ground that it is immaterial, outside of the issues before this Court. Upon the further ground that no proper foundation has been laid for the introduction of evidence of this type in accordance with the statutes under which the action is brought.

Miss Marten: I will withdraw the question, your Honor.

Q. By Miss Marten: What price did you charge Marvin Berry for the potatoes which you hauled for him in April and May of 1943?

Mr. Lerner: I am going to repeat my objection, upon the same grounds.

Miss Marten: I should like to add the words:—from the Bakersfield area and Edison to Los Angeles, California. A. 30 cents a hundred.

Mr. Lerner: My objection still stands.

The Court: Overruled. Exception allowed.

Q. By Miss Marten: To whom did you deliver the potatoes which you trucked for Marvin Berry from Edison to Los Angeles, California?

A. Victory Produce.

Q. The Victory Produce, where?

A. Here in Los Angeles.

Q. Do you know the address?

A. The Ninth Street market.

Q. Did you haul any potatoes from Edison or Bakersfield [8] areas to Los Angeles, California, in March of 1942? A. No.

(Testimony of Ruben Kundert)

Q. Have you ever made a search of the records of the Edison Trucking Company to see whether or not there are any records that disclose that you trucked potatoes from Edison or Bakersfield to Los Angeles in March, 1942? A. Yes.

Mr. Lerner: I object to the question as being compound. There are two questions.

The Court: Probably on cross examination, counsel, you can straighten it out, if there is any confusion.

Miss Marten: I will withdraw the question.

Q. By Miss Marten: Have you ever made a search of the records of the Edison Trucking Company for the hauls made by Edison in March, 1942? A. I have.

Q. Do you find any records of hauling any potatoes from Kern County to Los Angeles during that period?

A. No.

Mr. Lerner: I am going to object—

The Court: Don't answer until counsel has had a chance to object.

Mr. Lerner: I am going to object to the question upon the ground that it is immaterial, and does not relate to the issues, and is not in accordance with the pleadings. Furthermore, there is no showing as to whether or not the [9] testimony of this man is directed against the defendants Marvin Berry, Jim Jung and Marty Sherman as individuals, or whether in their capacity, doing business as the Victory Produce Company, or whether the purpose of this evidence is to establish a case against the Victory Produce Company. I feel a proper foundation should be laid. I am objecting on behalf of the defendant whom I represent, your Honor.

Miss Marten: I think as to the parties represented here the record speaks for itself, your Honor. As to

(Testimony of Ruben Kundert)

the materiality of this evidence, it goes to the question of determining Mr. Kundert's, the witness on the stand, trucking ceiling under the regulations of the G. M. P. R.,—General Maximum Price Regulation. That regulation provides that if a trucker hauled potatoes in March, 1943, the highest price which he charges at that time is the ceiling of his competitor.

Mr. Lerner: Even though it would establish that, still it is immaterial insofar as the issues are concerned; further, there is no showing as to whether or not this evidence is establishing the prices for Marvin Berry, Jim Jung as individuals—

The Court: Is there any difference between the ceiling price to individuals, and to a company or association or corporation, counsel?

Mr. Lerner: No, there is no difference, insofar as what the trucker is permitted to charge. The question is [10] whether that evidence is material evidence insofar as those defendants are concerned.

The Court: We can't pass on that until we get along in the case, and find out to whom it does apply. At the present time it doesn't apply to anybody. You can reserve your motion to strike any part of the testimony you think proper.

Mr. Lerner: I would like to reserve a motion to strike any part of this testimony after the same is introduced.

The Court: Yes, at the end of the government's case you are always privileged to do that, counsel.

Miss Marten: Will the reporter please read the last question?

(Question and answer read by the reporter.)

The Court: You spent a lot of time on something that did not mean anything, counsel.

(Testimony of Ruben Kundert)

Q. By Miss Marten: Referring now to the potatoes which you can decide you hauled for Marvin Berry, from Edison to the Victory Produce Company in Los Angeles, California, in April and May of 1943, where did you pick up those potatoes?

A. At Marvin Berry's warehouse.

Q. Where is that? A. In Edison.

Mr. Lerner: For the purpose of saving time, on behalf of the defendants I am representing I will stipulate that [11] this man hauled for Marvin Berry; that he delivered potatoes from the territory in Bakersfield, the company shipping point, to our receiving docks.

The Court: Where are your receiving docks?

Mr. Lerner: 1124 South San Julian Street, Los Angeles; that's the place of business where the defendants were doing business as the Victory Produce Company.

Miss Marten: Would counsel stipulate that the price which Mr. Kundert received for that trucking haul was 30 cents per hundred weight for all the potatoes which he hauled?

Mr. Lerner: We so stipulate, for the period in question.

Miss Marten: That is all.

Mr. Lerner: No cross examination, your Honor. I will make my reservation of a motion to strike. May I ask the Court this: In my motion to strike do I, as a matter of right, have the right to make a motion to strike at the end of the trial, or do I, for the purpose of the record, have to make it for each witness?

The Court: You may reserve it until the entire evidence is in, and make it then.

Mr. Lerner: If your Honor please, would it be improper for me to have the record show that it be clearly

(Testimony of Ruben Kundert)

understood I am not representing Martin Berry, either individually, or doing business as the Victory Produce Company, so [12] any objections or discussions I make, are not made on behalf of those defendants whom I do not represent.

Mr. Handy: We are suing these parties individually and doing business under a certain name. He is appearing for those two defendants individually, doing business under that name. If we show a partnership, we think he is appearing then for the partnership, as representing two of the defendants. We do stipulate he is not representing Mr. Berry personally.

Mr. Lerner: If your Honor please, I am ready to show that the way the action is brought, against Jim Jung, Marty Sherman and Marvin Berry, individually and doing business as Victory Produce Company, does not constitute an action against the partnership as such. I am ready to argue that as a matter of law. If the Court prefers, may I submit the matter by brief, and reserve the ruling, and have that evidence go in subject to that?

The Court: The Court would have no way of knowing the facts, and applying them to the principles of law until I know what the legal relations are between the parties.

Mr. Lerner: May I state, under Rule 17 (b) Federal Rules of Civil Procedure, it is stated:

"Capacity to Sue or be Sued. The Capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to [13] sue or be sued shall be determined by the law under

(Testimony of Ruben Kundert)

which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the District Court is held; except that a partnership or other incorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

Under Rule 17 it has uniformly been held, your Honor, that, therefore, the law of the state in which the District Court is held, if there is such law in that state, governs as to how the action shall be brought. It must then come under the law of California, and Section 388 of the Code of Civil Procedure sets out what a person must do in order to sue a partnership. Section 388 reads as follows:

"When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability." [14]

In other words, your Honor, under Section 388 of the Code of Civil Procedure of the State of California, in order to name a defendant company, or associate, or partnership, it is necessary that the partnership be named, as such. I have a number of cases, if your Honor please, holding to the effect that in order to bring an action against a partnership the mere naming of the individual

(Testimony of Ruben Kundert)

doing business as a partner does not constitute an action against the partnership, but, instead, is an action against the individual, and that those words are merely descriptive. May I cite the case of Bollman v. Bachman, 16 California Appellate, 589. Do you wish me to go into lengthy detail as to the holdings, in these cases?

The Court: It is not proper, counsel. I tried to suggest that at the beginning.

Mr. Lerner: The only thing is this, your Honor, I don't want to have any misunderstanding on whose behalf I am appearing.

The Court: You have stated it, and it is in the record. I am always anxious to have counsel protect his record. You have done it.

Mr. Lerner: That is all I am interested in at this time. [15]

JACK SCHNITZER,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

A. Jack Schnitzer.

Direct Examination

By Miss Marten:

Q. Mr. Schnitzer, what is your present address?

A. 1345 East Seventh, Los Angeles.

Q. What is your occupation? A. Trucking.

Q. How long have you been engaged in that occupation? A. Over ten years.

Q. Under what name do you do business?

A. Schnitzer's Truck Company.

(Testimony of Jack Schnitzer)

Q. Have you ever made truck hauls from Kern County, Bakersfield and Edison, California, to Los Angeles? A. Yes.

Q. Have you ever hauled any potatoes from Kern County to Los Angeles? A. I have.

Q. By truck? A. By truck.

Q. In March, 1942, did you haul any potatoes from Edison or Bakersfield, or that area around there, to Los [16] Angeles, California? A. I did.

Q. Do you have any record of the haul of potatoes at that time? A. I have.

Q. Do you have those with you this morning?

A. Yes.

Mr. Lerner: If your Honor please, we will stipulate that the haul in March, 1942, if that is correct, was 18 cents a hundred weight for potatoes, covering that territory.

The Court: Is that correct?

Miss Marten: Yes.

Mr. Lerner: May I ask the witness some questions on cross examination?

The Court: Yes.

Cross Examination

By Mr. Lerner:

Q. Mr. Schnitzer, did you haul potatoes in April or May, 1943? A. No, I don't believe I did.

Q. Did you haul any potatoes for the United States Government during that time?

A. It was probably around the latter part of May or June when I started hauling for them.

The Court: When you say "them", who do you mean?

The Witness: The government. [17]

(Testimony of Jack Schnitzer)

Q. By Mr. Lerner: Mr. Schnitzer, you are familiar with the prevailing rate for trucking in April and May, 1943, from that district, are you?

A. I think I am.

Q. What was the prevailing rate of hauling in April and May, 1943, from the district up and around Bakersfield, for hauling from Bakersfield to Los Angeles?

A. I know in April or May it was 30 cents. I didn't haul any.

Q. You didn't haul any yourself? A. But it was established when they had the meeting up there in Bakersfield. They told them they were getting 30 cents. That was understood at that time.

Q. That was the prevailing rate at that time?

A. That was the early part of the season.

Mr. Lerner: No further questions.

Redirect Examination

By Miss Marten:

Q. Mr. Schnitzer, at this meeting, which you say was held in Bakersfield at about that time, when you say they said that they were hauling for 30 cents, who do you mean said that they were hauling for 30 cents?

A. The truckers in general.

Q. Said that they were charging 30 cents?

A. That's right.

Q. Do you know what the ceiling price for trucking [18] from Bakersfield to Los Angeles was at that time?

A. I wouldn't know what the ceiling was, no.

Q. Was anything said at that meeting as to what the ceiling price was?

(Testimony of Jack Schnitzer)

Mr. Lerner: I am going to object to that upon the ground that it is immaterial as to what discussion took place as to what constituted the ceiling.

Miss Marten: I am merely asking him to clarify some statements this witness made, as to whether that was the prevailing rate. I don't believe it is clear what he is talking about.

The Court: Proceed.

The Witness: What is it?

Q. By Miss Marten: Was anything said at that meeting about what the ceiling price for trucking from Bakersfield to Los Angeles was? A. It was two or three days later that they told them they would have to go back to the 18-cent rate.

Q. Did they say why they would have to go back to the 18-cent rate?

A. That is what they decided the ceiling was.

Q. Did you make any statements at that meeting?

A. Nothing more than what we are talking about now.

Q. Did the truckers assembled there say that you had hauled potatoes in March, 1942, and that you had charged 18 cents for the haul? [19]

A. That was no secret; everybody hauled potatoes that year. It just happed to be I hauled about twenty sacks the last day of March.

Q. To your knowledge everybody in April and May, 1942, was charging 18 cents a hundred weight for potatoes? A. To my knowledge—1942?

Q. That is correct; I am referring to 1942; to your knowledge, as a trucker in business there, prior to the time the O. P. A. regulation came into effect, was there

(Testimony of Jack Schnitzer)

a fixed rate for hauling potatoes from Bakersfield to Los Angeles, California?

A. Do you mean from year to year?

Q. Yes.

A. It was more or less agreed upon, yes.

Q. Agreed upon by whom? A. By the truckers.

Q. In that area? A. Yes.

Q. In the year 1942 did the truckers all have such an agreement? A. Yes.

Q. What was that? A. 18 cents.

Q. In 1943 did they make an agreement? A. No, not that I know of. I was not up there.

Q. When you say that in 1943 the prevailing rate for [20] trucking was 30 cents, do you mean that was the rate which the truckers were charging?

A. All I know—after all, I didn't collect it; I didn't pay it; I wasn't there when anybody paid it. I don't know that they paid it. All I know is what went on in the meeting. That was what the truckers were trying to get, or talked to the O. P. A. about, was to get 30 cents a sack. That is as far as my knowledge goes on it.

Q. You are still engaged in the business of trucking?

A. Yes.

Q. You have been continuously for the last ten years?

A. Yes ma'am.

The Court: Where is your place of business?

The Witness: 1345 East Seventh.

Q. Los Angeles? A. Yes.

Q. By Miss Marten: Do you have a place of business in Edison, California, at this time? A. No.

Q. Did you in 1943? A. Not in Edison, no.

(Testimony of Jack Schnitzer)

Q. Did you have a temporary office at the El Cajon Hotel in Bakersfield?

A. That was a little later than the time we are talking about.

Miss Marten: That is all. [21]

Q. By the Court: This rate of 18 cents per hundred weight, what territory did that cover around Bakersfield? A. Do you mean in 1942?

Q. Yes.

A. That was Edison, Shafter, Wasco. That's about all.

Q. So when the rates were fixed for the transportation of potatoes by the truckers it referred to the area you have just mentioned, and whatever rate was fixed was the rate that applied to that area, is that right?

A. That's right.

The Court: Cross examine.

Recross Examination

By Mr. Lerner:

Q. As I understand it, Mr. Schnitzer, during April and May, 1943, the truckers as a whole were all charging 30 cents a hundred weight for hauling potatoes from this general area down to Los Angeles, is that right?

Mr. Handy: That is objected to upon the ground that the witness testified he did not know.

The Court: Let him answer, if he can.

A. Just as I stated, I didn't collect it; I didn't pay it out; I didn't see it transacted, except what went on at the time, and at that meeting that was the talk, 30 cents.

Q. Is that the meeting in which they stated they were charging and collecting 30 cents for freight from [22]

(Testimony of Jack Schnitzer)

Bakersfield and the Edison district down to Los Angeles? A. Yes.

The Court: Just a minute. That is what they were charging? You also said something about that was what they wanted to get from the O. P. A. Will you clear that up for us?

A. Are you talking about April and May, 1943?

Q. That's right.

A. This meeting was held some time the latter part of May, wasn't it?

Miss Marten: In the early part of it, I think.

A. It seems like the latter part of May. Up to that time nothing was done, and the truckers tried to get a 30-cent rate, and were denied that. Two or three weeks later, when there was another meeting held, they told them they could not charge over 18 cents. The way I took it, everything done up until then was dropped, and from then on it was going to be 18 cents.

Q. By the Court: Prior to the time the O. P. A. fixed 18 cents, is it correct to say that the truckers were charging and receiving 30 cents per hundred weight, or is that what they wanted?

A. Well, it could go either way. I know that's what they wanted, but whether they were charging it or not, I don't know for sure.

The Court: Any further examination?

Miss Marten: Not by the plaintiff. [23]

Recross Examination

By Mr. Lerner:

Q. To clarify one point: It is true, you testified, that at that meeting with the office of Price Administration, the truckers present at that time stated that they had been

(Testimony of Jack Schnitzer)

charging 30 cents, and the purpose of the whole thing was to cut it down to 18-cent ceiling?

A. The meeting was to see what they were going to establish the ceiling at.

The Court: You haven't answered counsel's question.

A. In other words, the O. P. A. was checking up on all the things at that time, so they called a meeting of the truckers, and they asked the truckers what they should have. The truckers were supposed to show cause why they would have to get more money, and so forth. So at that meeting, or the next meeting, it was decided from there on out that the ceiling price would be 18 cents.

The Court: You haven't answered the first part of counsel's question. Mr. Reporter, will you repeat it?

(Question read by the reporter.)

A. Yes, they did.

Q. They told the O. P. A. that they had been charging 30 cents?

A. To my knowledge, that's the way it was.

The Court: That answers counsel's question.

Mr. Handy: May the latter part of the answer be [24] stricken, your Honor; that which was not included in the answer as called for by your Honor's statement.

The Court: Mr. Reporter, will you read the answer?

(Answer read by the reporter.)

The Court: It may stand. Proceed.

Mr. Lerner: I notice the previous witness, representing the Edison Trucking Company, is still here. By reason of the testimony of this witness may I ask that he remain? I would like to have him here for rebuttal.

Miss Marten: Your Honor, we will be glad to have him called in rebuttal now, so that he can be free to go back to Bakersfield.

Mr. Lerner: That is perfectly satisfactory.

RUBEN KUNDERT,

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified out of order, in rebuttal, as follows:

Direct Examination

By Mr. Lerner:

Q. Mr. Kundert, during the period of March and April of 1943 do you know what the general rate for hauling potatoes was per hundred weight from the district of Edison and Bakersfield to Los Angeles?

A. 1943? That's when the dispute came up?

Q. That is when you were hauling potatoes for Marvin Berry. [25]

A. The O. P. A. came in and said the rate—

Mr. Lerner: I move that the last portion be stricken as not responsive.

The Court: He hasn't said anything yet. Read the question.

(Question read by the reporter.)

A. First we charged 30 cents, and when the O. P. A. came in and said there was supposed to be a ceiling of 18 we went back and charged 18 cents, just like they told us.

Q. By the Court: What period was that 30-cents charged?

A. It was right away. When we started, it must have been in April. Yes, in April.

Q. Did the truckers up there fix prices each spring, about April, is that correct? A. Yes.

Q. They had a meeting in April of each year?

A. Yes.

Q. In April, 1943, the truckers met and fixed a price of 30 cents or charge of that, did they? A. Yes.

(Testimony of Ruben Kundert)

Q. Until when?

A. It was around the first part of May, when the O. P. A. had the meeting.

Q. Did you hear the former witness' testimony with reference to the area to which the rate applied? Would your [26] answer be the same?

A. What area do you mean? Well, Edison and Shafter and Wasco, that gets them all.

Q. Some other town was mentioned.

A. Arvin.

Q. Yes. So those rates we are discussing here would apply to all that area, is that right? A. Yes.

The Court: Hereafter we will refer to it as the Bakersfield area, if that is satisfactory to the government and the defense. Any further questions?

Mr. Lerner: I don't think of any further questions, but I think counsel can probably stipulate when, approximately, that meeting took place.

The Court: This would be a good time to do that. Do you know when it was?

Mr. Smith: Just from information given to me by members of the Office of Price Administration I believe it took place May 4th or 6th, 1943.

The Court: Is that your understanding?

Mr. Lerner: No, my understanding is that the drop in rates took place about the 25th of May. At that time the truckers all reduced their rate.

The Court: Then you cannot stipulate.

Miss Marten: We talked of two times; we talked at one time as to what the ceiling price was, and at another time [27] as to what the truckers were charging. All this

(Testimony of Ruben Kundert)

conversation relates to the fact that they were charging 30 cents, and at a later time dropped it, but it has no relation to what the ceiling was.

The Court: We understand that.

Mr. Lerner: Yes, we so understand.

The Court: Any further questions of this witness?

Mr. Lerner: No.

DAVE SMITH,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

A. Dave Smith.

Direct Examination

By Miss Marten:

Q. Were you employed by the Office of Price Administration during the year 1943? A. Yes, I was.

Q. During the period of April, May, June and July, 1943, what was your capacity?

A. I was an investigator employed by the Los Angeles District office.

Q. What were your duties in that capacity?

A. I was assigned to the fresh fruit and vegetable unit, and my duties included making surveys pertaining to [28] matters of price control on fresh fruits and vegetables.

Q. Are you still employed by the Office of Price Administration? A. Yes, I am.

Q. What is your present capacity?

A. Enforcement attorney.

(Testimony of Dave Smith)

Q. Directing your attention now to around June and July of 1943, did you have occasion to make an investigation of the records of the Victory Produce Company, 1124 South San Julian Street, Los Angeles, California?

A. Yes, I did.

Q. Were you assisted by anyone in that investigation?

A. Yes, I was, by Mr. Jack Keenan of the San Francisco office, Accounting Division.

Q. With what part of the O. P. A. was he associated?

A. Accounting Division, San Francisco office.

Q. What occasioned your investigation of the *Victor* Produce Company at that time?

Mr. Lerner: I object to the question upon the ground that it is immaterial.

The Court: Overruled.

A. I was assigned, in the course of my duties as investigator, to make a survey to check the extent of compliance with the potato regulation in connection with the sale and purchase of potatoes by the Victory Produce Company. The attorneys making the assignment to me were Mr. Eugene [29] Breitenbach and Miss Arline Marten.

Q. Do you recall the exact date when you first visited the Victory Produce Company for the purpose of making this investigation?

A. No, I am sorry; I don't recall the exact date.

Q. Was it June or July? A. It was in July.

Q. Did Mr. Keenan accompany you when you first went there to make the investigation?

A. Yes, he did.

Q. To whom did you speak when you arrived at the Victory Produce Company? A. The person I am cer-

(Testimony of Dave Smith)

tain I spoke to was Miss Brooks, identified as office manager.

Q. Was anyone else present at that time?

A. Mr. Keenan.

Q. What was said?

A. I had met Miss Brooks before. I had also met Mr. Sherman and Mr. Jung.

Q. Were they present at the conversation I am asking you to relate?

A. I don't believe they were when we went upstairs to speak to Miss Brooks. They told us to see her about any matters pertaining to office records. Mr. Keenan and myself went up there and spoke to her.

Q. Who told you to see Miss Brooks, do you recall? [30]

A. I believe it was Mr. Sherman.

Q. At the time you saw Miss Brooks, and Mr. Keenan was present, what was said?

A. Mr. Keenan was introduced by me to Miss Brooks, as being associated with me in a matter pertaining to a prospective survey of their records of potato sales. I told her we were interested in making an audit of their purchases and sales of potatoes.

Q. Do you know what Miss Brooks' capacity was with the Victory Produce Company?

A. She identified herself to me as office manager; not on that ocasion, but she formerly had done so.

Q. What else was said after you told her you were checking records?

A. She asked me which records we were interested in looking at, and I told her they would include the lot sheets, lot records, sales invoices, purchase invoices, and possibly

(Testimony of Dave Smith)

other records which we might require, the necessity of which would be better known to us during the course of our survey.

Q. Did you inspect those various records?

A. Yes, we did; the two of us did.

Q. Did you inspect those lot records that you speak of? A. Yes.

Miss Marten: Counsel, do you have in court here this [31] morning the lot cards?

Mr. Lerner: Yes. I have these two volumes here.

Q. By Miss Marten: I want to show you this book of lot records, and ask you if you recognize this as the record that you inspected during the course of your investigation?

Mr. Lerner: Just state if that this book contains the April records, and the other one contains the May records. Is this the form in which the records were given to you at that time?

A. I have been looking through this to see if I can find some potato sales, that is, potato records. I haven't come across any that look familiar to me.

Q. By Miss Marten: Were the records in a bound book when you examined them?

A. Yes; they were in a book similar to this. I don't know whether this book includes potato records.

Mr. Lerner: I will say for the purpose of the record that the bound ledger which is being looked at by the witness includes all of the records of sales of potatoes by the Victory Produce Company during the period in question, and automatically includes potatoes purchased and sold.

A. Here is one I see here, Mr. Lerner.

(Testimony of Dave Smith)

Q. By Miss Marten: Do you recall what information the lot record contained in regard to potatoes?

Mr. Lerner: If your Honor please, the record speaks [32] for itself.

A. It is all before me.

Q. By *Mr.* Marten: What information do the records contain?

A. It has the name thereon: M. Sherman & Sons, Inc. and shows lot number, contents of lot, expenses, including freight, and it has a sales record indicating the quantity, the unit price, and individual or individuals or persons to whom sold. It has other information on there such as, for example, profit, but that was no part of our survey. We weren't interested in that. We made no note pertaining to that.

Q. Does it contain the date when the particular lot referred to was purchased?

A. It has the date of arrival, which my understanding was, it was a matter of hours for the haul from Bakersfield to Los Angeles.

Q. Does it contain the date when the potatoes were sold out of that lot?

A. Yes, it has the date sold.

Q. Does it contain the price at which the potatoes were sold? A. Yes.

Q. Does it indicate the grade of potatoes that were being sold?

A. The description, content, it has the designation [33] of the grade.

Q. Is there a price per hundred weight, or what unit is the price, the sales price?

A. At the time we made out audit we were told that that all speaks of unit.

(Testimony of Dave Smith)

Mr. Lerner: We object to what they were told upon the ground it is hearsay. The record speaks for itself, for what it is supposed to be. If he doesn't have the record, we have the invoices of original sales. What somebody told him is immaterial, and definitely hearsay.

The Court: Do you mean a statement by the defendant to this witness is hearsay?

Mr. Lerner: He doesn't say who told him.

The Court: Yes, Miss Brooks was in charge. He was told by Mr. Sherman to get his information from Miss Brooks; she was the general manager.

Mr. Lerner: Do I understand he was told by Miss Brooks this information he is now giving the Court, or he was told by somebody else as to what that constituted?

The Court: That is a good question. Answer counsel's question.

A. Mr. Lerner, the discussion of the records was had with Miss Brooks—the discussion pertaining to the records.

The Court: That is what I understand.

Mr. Lerner: Those statements made were statements made [34] by Miss Brooks, an employee of the Victory Produce Company?

The Court: That is what I understood.

Mr. Lerner: I have no objection then.

A. For example, we would understand it as such also, because it was my duty—I was familiar with that particular type of record. It says: "U. S. No. 1, 100 pounds." The potatoes were packed in two types of sacks. The pack customarily is 100 pounds, unless there is a smaller breakdown.

(Testimony of Dave Smith)

Q. Are they sometimes packed in 50-pound sacks?

A. Yes. This U. S. designation, No. 1, indicates No. 1 grade, packed in 100-pound sacks.

Q. Is the unit price stated in units of 100 pounds?

A. They were sold by sack, which would be sales of 100-pound sacks.

Q. In addition to these lot records you inspected purchase invoices, you say? A. Yes, Miss Marten.

Q. For the purpose of the record, these pink invoices which I now show you, are they purchase records of the Victory Produce Company for potatoes, during April and May, 1942?

Mr. Lerner: I am going to object to all of the testimony that has been introduced by Mr. Smith so far, the objection being raised on behalf of Marty Sherman, Jim Jung, individually, and doing business as Victory Produce [35] Company.

The Court: Let the record so show. Objection overruled. Exception allowed defendants.

Q. By Miss Marten: I show you these pink purchase invoices, Mr. Smith, and ask you if you recognize those as purchase invoices which you inspected at the time of your investigation.

A. They look like the invoices we checked over. I believe that we also checked some green ones.

Mr. Lerner: If your Honor please, I am going to move that the answer be stricken as not responsive. The question was whether or not these were the ones he had checked, not "we". The answer was "we".

The Court: All right. Did you check these?

A. Yes, I did, your Honor.

(Testimony of Dave Smith)

Q. By Miss Marten: Will you see if you can identify any of these as the record which you were called to inspect at that time, the purchase record covering potatoes?

A. As I say, I think we also saw some green ones. On these green ones was stamped a lot number, if I recall correctly. I think we saw these also, and some green ones which were possibly duplicates of these. I think we used these. There was a cross reference; for example, a lot number, a purchase ticket from Marvin Berry, and we would cross check the lot book to reconcile the figures and facts on both of these records. [36]

Q. Did you find that these purchase invoices cross checked with the lot cards contained the same information as was put on the lot cards?

Mr. Lerner: If your Honor please, I object to that upon the ground that it calls for the conclusion of the witness, and without proper foundation.

Miss Marten: I will withdraw the question, your Honor.

Q. By Miss Marten: You say you cross checked the lot cards and purchase invoices. What did you cross check?

A. Well, for example, I have before me Lot No. 375. We looked for the purchase ticket, which had the stamp on there, which Miss Brooks informed us also indicated a lot. We looked for the ticket bearing lot No. 375, which we checked to see whether or not the facts stated on the purchase invoice were the same as transposed on the lot sheet.

Q. What did you find the fact to be?

A. In a great majority of cases they were the same. However, there were a few discrepancies.

(Testimony of Dave Smith)

Q. Did you ever have occasion to look at the sales invoices of the Victory Produce Company during your investigation? A. Yes, we did.

Miss Marten: For the purpose of the record, can we stipulate that these six bound volumes here constitute the sales invoices of the Victory Produce Company, covering the sales of potatoes during April and May, 1943? [37]

Mr. Lerner: I will stipulate that they include all of the charge sales for the period in question, and automatically includes the sales of the Victory Produce Company. There were certain cash sales made, but we were unable to locate the record of cash sales. However, I will state this, that the cash sales are comparatively minor and insignificant with respect to the amount of charge business done. However, the stipulation I am entering into is not on behalf of the Victory Produce Company; I am entering into this stipulation on behalf of the individuals. We recognize these records are records of the Victory Produce Company.

Q. By Miss Marten: I show you one of these six volumes, which is identified as sales record, and ask you if you recall making an investigation as to any of these sales records with regard to potatoes.

A. Yes, these are records, these yellow tickets, recalling to my memory that part of the audit we made were these sales tickets.

Q. What investigation did you make of the sales tickets?

A. Specifically I checked, spot checked such sales tickets to ascertain whether or not the information placed on the lot sheets was the same as would have been on the

(Testimony of Dave Smith)

sales invoices. We did not go through every sales invoice; just made a spot check.

Q. What did you find on that spot check regarding [38] the indication on the lot card of the sales that were made, compared to the sales invoices?

Mr. Lerner: I object to the question on the ground that the proper foundation has not been laid. He stated "we checked"; now she wants to get an answer as to what he found.

Q. By Miss Marten: Did you yourself make the check?

A. I checked, but Mr. Jack Keenan also checked with me. That's why I used "we".

Q. How did Mr. Keenan check with you?

Mr. Lerner: I object to the question on the ground that it is hearsay.

The Court: No, that would be a statement of what he did; just how they handled the physical transaction. Proceed.

Q. By Miss Marten: Just what did you and Mr. Keenan do?

A. Again illustrating, assuming we had lot 375 before us, and we had a record of sales, possibly we would find lot 375, that particular lot indicated on the sales invoices. Also we tried to find the same sales tickets with the lot number on, and checked from them whether the price on the sales invoices was the same as transposed on the lot sheets.

Q. What part did you check, and what did Mr. Keenan do? [39]

A. We both worked together. We had lot sheet 375 before us, we will say, and we checked to see if we could find any purchases on the sales records. He would pick

(Testimony of Dave Smith)

up the book, or I might pick up the book, and we might check; or I might look at it and compare it, and see what it showed.

Q. Were there any other records you had occasion to inspect during the course of this investigation?

A. I think, as I say, I saw some green invoices. Possibly my recollection is wrong, because I did not see any this morning.

Q. Did you have occasion to look at the records of the company invoices for the haul of potatoes?

A. Well, I know we looked at some invoices which were there, and had the designation "Edison Trucking Company" on them.

Miss Marten: Can you stipulate for the record, Mr. Lerner, that this folder, yellow or orange invoices, contain—what does it contain?

Mr. Lerner: On behalf of my defendants I will stipulate that this folder contains freight charges by Edison Trucking Company to Victory Produce Company, but those were invoices chargeable to Marvin Berry.

Miss Marten: Do you stipulate that for the record?

Mr. Lerner: Yes; that's for the purpose of the record. The testimony was that the hauling was done for the Victory Produce Company. [40]

Miss Marten: Are you stipulating that these are the trucking invoices which were paid by Marvin Berry, or by Victory Produce Company?

Mr. Lerner: I think maybe we ought to enter into the stipulation this way; I offer this stipulation: I think it is generally recognized that the sales were made on a delivered basis; that the freight was being purportedly paid for by Mr. Berry, but as a matter of bookkeeping convenience, at the request of Mr. Berry we would pay

(Testimony of Dave Smith)

the freight directly to the Edison Trucking Company, and deduct the same from the price billed to us by Marvin Berry or other potato companies from whom we purchased. I say "we"; I mean from whom the Victory Produce Company purchased.

Miss Marten: We don't stipulate to that, your Honor.

The Court: Didn't you make a summary or statement from all of these records with reference to the issues in this case, as to the purchase of potatoes and the grade and price and trucking charge, as shown by these bills? Didn't you make a summary of that from the books?

A. Yes, we did, your Honor.

The Court: Have you seen it?

Mr. Lerner: Yes, I have seen the summary, your Honor, but the question arises in my mind whether or not it is proper to introduce a summary of this nature. The cases clearly hold, in order to permit the introduction of a summarization from the books, that proper foundation must be [41] laid to show that the summary was properly arrived at; also, opposing counsel must have an opportunity to cross examine in order to establish its accuracy.

The Court: I was not thinking of a whole lot of legal technical objections at all. These are very simple matters, and the thing we are trying to get away from in this court is a lot of technical, time-wasting procedure. Here are records. This witness could spend two weeks in saying that on line 1 he finds a truck of potatoes of 500 sacks, at a price of so and so. That is absolute nonsense.

Mr. Lerner: I agree with your Honor.

The Court: We are all familiar with the rule in regard to a summarization, that the witness must qualify to show how they were made. There is no reason why

(Testimony of Dave Smith)

counsel can't sit down and go over this, and satisfy themselves that they are records, the prices, the dates, the amount paid, and introduce them as an exhibit. If counsel desires to take up the time of the court, and take up every item to establish them, I will proceed on that theory.

Mr. Lerner: If your Honor please, counsel has no purpose in mind of doing anything of that nature. The testimony so far has been merely to show the procedure which he followed in order to arrive at a summary. It is my stipulation that his findings were probably correct, providing the procedure he used was also correct. The only objection I have to the summarization that has been made by counsel for [42] the plaintiff is, in addition to showing what the costs and sales were, they attempt to show the purported price ceiling or purported violation. by sales in excess of the ceiling. Those are only conclusions of law.

The Court: You are absolutely right, counsel. In other words, you are not stipulating to the fact that they are not proper ceiling prices. I would not ask you to do that. All I ask you is not to take up the time of this court or the other lawyers in cases that should be tried. When it comes to a matter of bookkeeping, one thing that annoys the Court is to have to sit around the whole day, and have counsel get up at the end of the day and say, "We stipulate to all of that."

Mr. Lerner: I have no intention whatsoever of putting the Court under that burden. The only thing that I am interested in, and for the purpose of the record, for my own information, is to see if there is any basis for cross examination, and the basis for cross examination is the procedure which he followed in arriving at the figures

(Testimony of Dave Smith)

shown by plaintiff in the exhibits that were used in the pre-trial matter.

The Court: Counsel, will you hand that exhibit to counsel, and let him take the witness on voir dire, and see if he is satisfied with the method by which that was compiled?

Mr. Lerner: I believe I have a copy of it. [43]

Voir Dire Examination

By Mr. Lerner:

Q. Mr. Smith, I show you Plaintiff's Exhibit No. 2 for identification. You have seen this before, have you?

A. Yes, sir.

Mr. Lerner: For the purpose of the record, this is headed, "Victory Produce Company, Los Angeles, Cal. Overcharges based on 21 per cent mark-up, April, 1943," and starts with page 1 and continues consecutively to page 17, and still in the same exhibit, commences again on what is shown on here as Schedule 2, page 1, Victory Produce Company, Los Angeles, Cal., overcharges based on 9-1/2 per cent mark-up, April, 1943; and continues as such, under Schedule 2, separately numbered pages from 1 to 6; and then continues with the further designation, within the same exhibit for identification, as Schedule 3, page 1, and is headed, Victory Produce Company, Los Angeles, Cal., overcharges based on 21 per cent mark-up, May, 1943, and continues, numbered consecutively, to page 5; and then we have as the last page of this exhibit, Schedule 4, headed, Victory Produce Company, Los Angeles, Cal., overcharges based on 9-1/2 per cent mark-up, May, 1943. There is only one page of that. You are familiar with this entire exhibit?

A. Yes, I have seen it, Mr. Lerner.

(Testimony of Dave Smith)

Q. Was that prepared from the record that you had [44] compiled? A. Yes.

Q. Would you say that you had compiled that, or they were compiled by you and Mr. Keenan?

A. Compiled by Mr. Keenan and myself; not by me alone.

Q. Do you know what proportion of this work was done by you, and what proportion was done by Mr. Keenan?

A. Do you mean what proportion of the entire audit?

Q. Of the compilation.

A. No. What compilation do you mean?

Q. In order to establish these schedules which you prepared on behalf and for the United States Government, Office of Price Administration, you made an audit of the Victory Produce Company, is that correct?

A. Right.

Q. Along with you was a Mr. Keenan, also employed by the Office of Price Administration? A. Right.

Q. You worked together? A. Right.

Q. Throughout the entire audit? A. No.

Q. Did not Mr. Keenan work with you?

A. We were there for several days; then I was assigned to another matter for some time; then I came back, and we finished it. So there were possibly a couple of days taking [45] facts and figures alone, but when I came back I checked them.

Q. In the course of your checking, you attempted to check from the original invoice to this record, which is a secondary record; that was your first posting from the original record?

A. I believe that is the system Victory used.

(Testimony of Dave Smith)

Q. Is that how you audited it?

A. We cross checked from the sales invoices to this, but this is the primary record we resorted to.

Q. Referring to the lot record; in other words, you went first to the lot record, and from the lot record you went back to the invoice record? A. Yes.

Q. You went back from the invoice record to the purchase record, and from the lot record to the purchase record?

A. Yes, we looked also at the sales summary sheet or record. I recall at the time we wanted to verify another fact, that is, the total sales indicated in here, as to whether or not they were reflected as the total sales elsewhere. We asked Miss Brooks at that time if there were any records in which this same account possibly could have been posted, or account for this particular line. She gave us what she called a sales summary.

Q. The sales summary was the purported summarization of the total sales for each respective lot of potatoes taken [46] from the total arrived at from the lot record, is that correct? A. That is my recollection.

Q. So far as you know was there any method by which you checked the total sales in the lot record with the sales shown on the general ledger, the actual sales of the company?

A. I don't believe we checked the general ledger, Mr. Lerner.

Q. In other words, you would not know whether or not the total sales as reflected in the sales summarization as the actual sales, are shown on the general record?

A. There might have been a record which we did not see, which might have had the figure; I don't know. But

(Testimony of Dave Smith)

the records we did check, though, we found they were the same.

Q. In the course of your auditing did you make any marks or designation upon the records which you checked?

A. I don't believe we marked them at all.

Q. You made no markings?

A. When I was an investigator I never made any marks on the records I checked.

Q. Is that in accordance with instructions of your superior? A. I don't think it was.

Q. You had no instructions as to the procedure to follow in your audit; that was in your discretion?

A. Before I was ever engaged they ascertained whether [47] or not I was competent to do that. They never told me whether I should or should not mark the records.

Q. What has been your experience in making audits?

A. While in college I took accounting. When in school, in order to help pay my tuition I did some accounting outside. When I went to work for the O. P. A. I also did auditing in the course of my duties as investigator.

Q. For the purpose of determining your experience, what year was the first time you commenced doing any accounting work?

A. Let's see when I started college. I would say 1936.

Q. Is that when you started college?

A. No, 1935, but I did not take accounting in my first year.

Q. In 1936 you took a course in accounting?

A. As I recall, I started in 1936.

(Testimony of Dave Smith)

Q. What school was that?

A. I first attended the Los Angeles City College; then I went to the University of California at Los Angeles; then I took law at Loyola.

Q. At what school did you take accounting?

A. I took accounting at the Los Angeles City College; also some accounting at U. C. L. A.

Q. How many years did you study accounting?

A. As I recall, two years. [48]

Q. In other words, you studied in 1936 and 1937; is that correct?

A. That would be approximately true.

Q. What year was it that you first applied whatever knowledge you acquired to accounting?

A. As soon as I learned enough about it I tried to assist my father in his business.

Q. What year was that?

A. I would say about 1936, after I had learned the elements of accounting.

Q. Bookkeeping?

A. No, I took accounting, not bookkeeping.

Q. You had had a course in bookkeeping prior to that time? A. No.

Q. You started out immediately with accounting?

A. That's right.

Q. What was your first experience in auditing?

A. As I recall, they were records which I was keeping in order to assist in meeting my expenses. The work was done in connection with an audit of the Unemployment Commission of the State. They desired me to make an audit concerning records, concerning certain stocks they desired. I believe that was the first time I made an audit record.

(Testimony of Dave Smith)

Q. What year was that?

A. I can only approximate. [49]

Q. What is your best recollection?

A. That was possibly about 1937. However, I haven't been an auditor. That's not my profession.

Q. You haven't been an auditor?

A. No. The work I have done in auditing has been only incidental. First of all my pursuits was the study of law; secondly, the practice which I have had. That was not my profession, and in the work I did in this it was primarily picking up information. I don't think anybody would have to have any auditing experience to make a copy of this.

Mr. Lerner: I move the last portion be stricken as not responsive, and volunteered.

The Court: I was going to say that myself. In other words, you take a stenographer who never saw a book and say to her, "Copy this page." You don't have to show that she went to college for ten years, and was a stenographer for five years, and a certified public accountant to copy some pages out of a book. Proceed.

Q. By Mr. Lerner: Have you any idea—can you form any basis of what percentage of the actual invoices were verified or checked with the lot sheets?

A. I couldn't. That was done in June and July of last year. I really don't remember. It was a spot check; not a complete check.

Q. You don't know what percentage of invoices you checked to arrive at your spot check? [50]

A. No; I do not.

Q. You don't know whether it was 5 per cent or 10 per cent or 15 per cent? A. No.

(Testimony of Dave Smith)

Q. You don't know what percentage of the check was made by Mr. Keenan?

A. No, sir. I would say the same percentage would apply for our joint work. However, I might add we not only checked the credit tickets you have here today, but also some of the cash tickets.

Mr. Lerner: If your Honor please, for the purpose of expediting the entire procedure, we have no objection to stipulating, insofar as the defendants that I am representing are concerned—if the Court should hold I am representing the Victory Produce Company—that is a legal conclusion; I am of the opinion that I am not representing the Victory Produce Company, but I am representing the defendants I named, as the record will show—

The Court: We will take that up, as I have said, at the conclusion of the case. I will hear the facts, and then we will proceed with the law.

Mr. Lerner: On behalf of the defendants I am representing we will offer to stipulate this, your Honor: That Exhibit No.2 for identification on behalf of the plaintiff, insofar as the same recites the lot number, the grade, the number of 100-pound sacks sold, and the selling price, is [51] probably reasonably accurate.

The Court: Put it this way; that it is accurate, subject to any correction that counsel may find necessary during the trial.

Mr. Lerner: With the further exception, if your Honor please, that we will not stipulate as to anything affecting the 50-pound sacks, on the ground that it is a variance and contrary to the pleadings. The pleadings allege the sale of 100-pound sacks, and says nothing about 50-pound sacks. May I refer the Court's attention to page 2 of the amended complaint, at Paragraph 5. No

(Testimony of Dave Smith)

reference whatever is made in the complaint as to 50-pound sacks. Therefore any evidence offered as to 50-pound sacks is at variance with the pleadings, and it is objectionable upon that ground.

The Court: Is there any difference, counsel, in the ceiling price on 100-pound sacks, in the handling and sale of it, the same kind of potatoes, and 50-pound sacks?

Mr. Lerner: I believe there is. I believe there is an allowance for sacking.

Miss Marten: That is not my understanding. There is on 20-pound sacks, and odd sacking.

The Witness: There is no increase in mark-up. I have the regulation here.

The Court: The government has stated its case on 100-pound sacks. I think Mr. Lerner is correct.

Mr. Lerner: Any evidence as to 50-pound sacks would be [52] immaterial, and outside of the issues.

The Court: I will rule with you on that, Mr. Lerner, because the government attorney stated 100-pound sacks.

Mr. Lerner: I offer to stipulate, as to this summarization prepared by the plaintiff, insofar as that affects the 100-pound sacks, we are willing to stipulate that the record is a reasonably accurate record of the sales of the Victory Produce Company. I make this stipulation on behalf of the clients I am representing. I would like to have the record clearly show that no stipulation is being entered into at this time as to what constitutes the proper mark-up, or what constitutes overcharges, if any, or what constitutes maximum price ceilings, or what constitutes any overcharges, if any.

Miss Marten: We are agreeable to stipulating to that. At this time we will offer in evidence Plaintiff's

(Testimony of Dave Smith)

Exhibit 2 for identification, subject to that stipulation. I might suggest, Mr. Lerner, that the stipulation be that Plaintiff's Exhibit 2 for identification is correct, subject to any variance which counsel may show later, rather than stipulating that it is reasonably correct. Can you make the stipulation that it is correct, subject to any change that is made? To stipulate that it is reasonably correct does not do us much good in determining damages.

The Court: I think, Mr. Lerner, that is the correct stipulation. If there are any errors the Court is willing [53] to see that they are corrected. I am sure nobody wants to go through each one of these entries now.

Mr. Lerner: Will the reporter read that?

(Record read by the reporter.)

Mr. Lerner: Yes, I think that is reasonable, your Honor. I have no objection to stipulating to that. I want it clearly understood that there is no stipulation as to anything other than the first four columns to the left.

Miss Marten: May this be admitted in evidence?

The Court: In evidence, subject to the stipulation.

The Clerk: Exhibit 2 in evidence.

(The document heretofore marked as Plaintiff's Exhibit No. 2 for identification, was received in evidence.)

Miss Marten: Do you want to stipulate as to Plaintiff's 1 for identification, which was heretofore offered?

Mr. Lerner: I refuse to stipulate to that. I think it is absolutely incorrect. I am sorry.

Q. By Miss Marten: Mr. Smith, during the course of your investigation did you make any calculation from the records of the Victory Produce Company as to the ceiling prices which applied to them for the sale of the

(Testimony of Dave Smith)

various grades of early white potatoes, during April and May of 1943?

A. I calculated ceilings for the potatoes, for which the summary was made, all grades and varieties.

Q. As investigator of the O. P. A. were you familiar, [54] at the time of your investigation, with Maximum Price Regulation 271, as amended?

A. As amended, yes, I was. Most of my work related to 271 at that time, because potatoes were quite critical.

Q. Will you tell us how you calculated, just in general, not as to any particular ceiling, but in general, the method you used to calculate the ceiling price of potatoes for the Victory Produce Company; for instance, U. S. Grade No. 1 potatoes?

A. The regulation sets forth the procedure to be followed in figuring or calculating ceiling prices, and I followed the procedure outlined in the regulation.

Q. What was that?

A. Substantially I believe it provides this—however, as I say, we followed it right down, and I may miss some particular phase of it in describing it here now, because it has been quite some time since I worked with it. At the time I was very familiar with it. It provided that the intermediate seller of potatoes shall calculate the ceiling price for each grade or variety of potatoes which he desires to sell a particular week, the week beginning on a Monday, during the preceding seven days the seller is to check from his own records the largest single purchase of each grade and variety of potatoes purchased to determine his net cost.

Mr. Lerner: I object to the question upon the ground [55] that it is not the best evidence. The Act

(Testimony of Dave Smith)

can be introduced to show what it provides, rather than his recollection of what the Act provides.

The Court: That is correct.

The Witness: It is the regulation—

The Court: You have them here. I think the Court takes judicial notice, but counsel is correct; the Act speaks for itself, or the regulation. Have you got one, counsel?

Miss Marten: Yes, I did have one I think in our pre-trial brief, which listed the pertinent section. [56]

Mr. Lerner: On the 27th of May Regulation 271 was revised. I want to make sure we are not getting the revised regulation rather than the original regulation as amended.

Miss Marten: This is M. P. R. 271, up to May 27th.

Mr. Lerner: Yes, that seems to be right. I intended to bring in, to further show to the Court, in case he needed it, the Federal Register showing it. This appears to be correct.

Q. By Miss Marten: I am not asking you now what the regulation is, but first, as to how you calculated the ceiling. Did you make a memorandum of the calculation which you made of the ceiling prices of potatoes sold by Victory Produce during the period April and May, 1943?

A. Yes.

Q. Was that written up in typewritten memorandum form? A. Yes, it was.

Q. I show you Plaintiff's 1 for identification, and ask you if you have seen that before?

A. Yes, I have.

Q. Is that the typewritten copy of your memorandum of the calculation of the ceilings for each grade of potatoes for each week during April and May, 1943?

(Testimony of Dave Smith)

A. It represents all the calculations I made as to the ceilings on various grades and varieties which their records indicated were sold.

Q. I direct your attention to the part of the [57] memorandum which says, "Size and Grade Differential Sales—April 5 to April 19," and there is indicated No. 1-A. What does that mean?

A. 1-A represents U. S. No. 1, Size A. No. 1 is the grade, and A is a size.

Q. Then these figures "Base 2.70." Will you explain how you arrived at the calculation of a price for the Victory Produce for No. 1-A potatoes for the week beginning April 5, of $3.73 per hundredweight, as itemized here?

A. The regulation sets forth the country shipping prices. The price of $2.70, instead of calling it country shipping prices, the price I put on my shipping base was $2.70. The regulation provided at the time 10 cents 1 hundredweight, Size A, so I added 10 cents; it also provided that where the country shipper makes a sale on a delivered basis he can add 10 cents per hundredweight.

The Court: Plus transportation?

The Witness: Yes. "Frt" stands for "freight," which is another charge the country shipper can make in determining the delivered price of potatoes. Those were four items which were applicable to these particular potatoes, at Los Angeles; that is, the delivered price to L. A. was $3.08, and we figured it that way. The reason I added was because we allowed 18 cents freight rate, which I was informed was the ceiling price, whereas their calculation [58] included a charge of 30 cents.

(Testimony of Dave Smith)

Q. In your calculations you used the freight rate of 18 cents, and with a mark-up made $3.73, the ceiling price hundredweight for this size potatoes?

A. Adding $2.70 and the others, on Grade 1, it gave us a price of $3.08, delivered at L. A., per hundred pounds. The regulation provides that sales made on a delivered basis, a mark-up of 1.21 shall be taken over the delivered cost.

Q. When you say sales made on a delivered basis, do you mean sales made by the Victory Produce Company?

A. Yes. In describing the price, I am computing the ceilings which they showed us in their sales.

Q. Service and delivery sales?

A. Yes, a 1.21 per cent mark-up figure was applicable to that type of sale. 1.21 times $3.08 resulted in a ceiling of $3.73 per hundredweight.

Q. Did you calculate any other type of ceiling for any other type of sale for Grade No. 1 Size A potatoes?

A. There was a 9-1/2 per cent mark-up applicable where the sale was not made on a delivered basis. I used the delivery cost, transportation cost of 3.08, multiplied by 9-1/2 per cent, which resulted in a ceiling price of $3.37 per hundredweight.

Q. Did you make an investigation of the records of the Victory Produce Company to see what was the net cost of [59] their largest single purchase of U. S. No. 1 Size A potatoes for the week preceding April 5, 1943?

A. As I recall, there weren't any purchases of potatoes made prior to April 5. That is my recollection. There may have been. If there were, what I did—the regulation says to show the largest single purchase of the preceding week.

(Testimony of Dave Smith)

Mr. Lerner: I object to the answer upon the ground that it is not responsive, and further, his recollection is improper.

The Court: The regulation has been introduced.

Q. By Miss Marten: What net cost did you determine as net cost for U. S. No. 1 Size A potatoes on which to apply the mark-up for the sales made after April 5th? How did you arrive at that net cost? Where did you get that figure?

A. It would be from a purchase of potatoes in which these various figures were applicable. It would either have been the largest single purchase of the preceding week, which I doubt, because as I recall, I don't believe there were any purchases prior to April 5th; or it would be the most recent purchase, which is another alternative for calculating the price where there aren't any purchases during the preceding week.

Q. You did one or the other of those two things?

A. That is correct.

Q. I see you calculated a price for No. 2 potatoes, [60] on page 1 of this Plaintiff's 1 for identification. What essential difference is there in the calculations for Size 2 potatoes as distinguished from U. S. No. 1 A potatoes?

A. One factor is I deducted 30 cents per hundredweight for the grade; and the second factor would be the absence of the Size A. We get on U. S. 1 A a premium of 10 cents, whereas there couldn't be on No. 2, which is not Size A; which gave a net difference of 40 cents per hundredweight.

Q. Will you refer now to page 2 of the schedule, Plaintiff's Exhibit 1 for identification, where it says: Sales April 19 to April 26, 1943. Tell us how you ar-

(Testimony of Dave Smith)

rived at the ceiling prices for the different grades of potatoes which are indicated on page 2.

A. Shall I take each one of the grades and *varities*?

Q. Tell us in general.

A. Well, U. S. No. 1 potatoes, the country shipping price there was $2.70 per hundredweight; 10 cents for selling on a delivered basis; and the freight—the freight we used was different from the freight actually paid, because of the reason brought to the attention of the Court. That resulted in a net cost of $2.98, taking that particular grade of potatoes. This was computing the ceiling for potatoes sold during the week of April 19 to April 26, 1943. In making that selection I looked back to the largest single purchase in the preceding week, and found the price that was [61] applicable, taking respectively, and multiplying 1.21 per cent and 9-1/2 per cent, which fixed the ceiling of $3.61 per hundredweight with 1.21 mark-up and $3.26 with the 9-1/2 per cent mark-up.

Mr. Lerner: I think we might be able to save some time, if it would be stipulated to this extent: I am satisfied mathematically speaking, his computation is correct. I disagree with him as to the figures he used in determining the basis, but from a mathematical standpoint I am satisfied to stipulate that $2.70 and adding 10 cents and 18 cents, comes to $2.98, and on the application of 1.21 and 1.095 would bring the result shown on Plaintiff's Exhibit 1 for identification. I am willing to stipulate that the mathematical calculations are correct; that anything with respect to the 50-pound calculations are not within the stipulation, because not within the issues. I am further willing to stipulate that the base price, he used in all cases was the country shipper's

base price, but I am expressly not stipulating to the manner or method of arriving at the maximum price ceiling that he used. I am offering to stipulate that the computations made by Mr. Smith were accurately computed, based upon the theory that he followed. I am not stipulating that the theory that he followed is correct.

Miss Marten: You stipulate that Plaintiff's 1 for identification reflects the theory that Mr. Smith followed? [62]

Mr. Lerner: Yes. In other words, he followed the country shipping theory. I think I can stipulate this: That the theory followed by plaintiff to determine the maximum price ceiling was they took the country shipping point under the regulation which specifies how a country shipper determines his prices; thereafter they added price differentials, based on grade, quality and size, and thereafter they added the freight rate of 18 cents, which they contend was the maximum price ceiling which the country shipper could have, or was permitted to have, and in some cases the freight rate of 22 cents, which is the railroad or common carrier rate.

The Court: Would you further stipulate that the potatoes' weight correctly reflects the books of the company?

Mr. Lerner: I don't quite understand that, your Honor.

The Court: In other words, to start with, what the books reflect in the way of potato sales?

Mr. Lerner: As to the highest individual purchase?

The Court: Yes.

Mr. Lerner: I stipulate that is correct; the record shows that. There is no point in doing otherwise. I will stipulate to that, your Honor. This stipulation is being offered on behalf of the defendants I represent.

The Court: I understand. [63]

Miss Marten: I think at this time we will offer Plaintiff's 1 into evidence.

The Court: Subject to the stipulation?

Miss Marten: That is correct.

Mr. Lerner: And subject to the 50-pounds not being a part of it.

The Court: I ruled on that, the 50-pounds is out, because it is not stated in the complaint, the government resting on the 100-pound sales.

The Clerk: Plaintiff's Exhibit 1.

(The document referred to was marked as Plaintiff's Exhibit 1, and was received in evidence.)

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [64]

Los Angeles, California, Wednesday, November 1, 1944, 2:00 p. m.

Mr. Handy: May it please your Honor, during the morning session there was a stipulation offered concerning some of these matters, and concerning 100-pound and 50-pound sacks of potatoes. Objection was made to the introduction of the evidence under the document that was being stipulated into evidence, that portion thereof which referred to the 50-pound sacks, and that that should not be included in the stipulation. We did not make an objection at that time, because, as a matter of fact, we were a little bit taken by surprise; we did not anticipate it, and were not certain what the situation was. During the noon hour I have looked through the pleadings, and have checked the rules of court. We would like at this time to amend our pleading by adding "One hundred sacks and fifty pound sacks." We base that on Rule

15 of the Federal Rules of Civil Procedure, on the ground that it is not taking counsel by surprise. It makes no difference in the computation of the ceiling or of the overcharge. We contend that the charge for 50 pounds was the same as 100-pound sacks; it just being a matter of the potatoes being shipped in two 50-pound instead of one 100-pound sack and examination of the document introduced shows there were quite a number of these lots or items that were shipped in 50-pound sacks. We can't see the defendant is prejudiced at all, and we feel under Rule 15, where it says, [65]

> "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires";

also under (b), Rule 15, where it says,

> "If evidence is objected to as the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merit of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

Were this a criminal matter, I think it might be quite different, but under the facts here it is merely a matter of whether or not these things were shipped in 50-pound or 100-pound sacks. It makes no difference in price; it makes no difference in quantity. On 25 pounds or less there is a package differential difference in cost; that might be all; but not with 50 pounds. We can't see that it would be prejudicial one way or the other.

Mr. Lerner: If your Honor please, we feel that it would be prejudicial in this respect; in the first place, the statute is not strictly remedial, but is penal in nature, and being penal in nature, it should be construed more strictly. In the second place, is the fact that the [66] statute of limitation has run, for bringing an action in a treble damage suit. Now, to bring in an issue, which was not in the original issue, is now amending it to bring in something which is barred by the statute of limitations. Therefore I think the Court should not permit an amendment to the complaint.

Mr. Handy: I take issue with counsel as to the fact that the statute has run. These particular potatoes were included in the complaint. The only thing is, the complaint alleges they were in 100-pound sacks, whereas the evidence introduced shows that some were in 50-pound sacks. We have sued for these particular potatoes, and the only question is as to whether they were put up in smaller sacks.

(Further discussion.)

The Court: I will deny the government's motion, and allow the government an exception.

DAVE SMITH,

called as a witness by and on behalf of the plaintiff, resumed the stand, having been previously duly sworn, testified further as follows:

Direct Examination

(Continued)

By Miss Marten:

Q. I believe that we had just introduced Plaintiff's Exhibit No. 1 in evidence, and that was the schedule of ceiling prices which you had computed. Now, referring

(Testimony of Dave Smith)

to Plaintiff's Exhibit No. 2, referring to Column 5 thereof, [67] which is entitled 21% Mark-up Ceiling Price, can you tell me where the ceiling prices in Column 5 of all of the pages of Plaintiff's Exhibit 2 came from?

A. The ceiling prices came from a computation of ceiling prices appearing on Exhibit 1. It is merely a transposition. The same would be true for the ceilings indicated as 9-1/2 per cent on the other pages.

Q. In other words, for the sales that were made, service and delivery, you took the ceilings and calculated it for the service and delivery ceiling?

A. That is right.

Q. For the sales that were made cash and carry, did you use the ceilings as calculated for the cash and carry sales?

A. Well, they were a 9-1/2 per cent mark-up, and the ceiling for them is indicated on the exhibit, but for the non-delivery sales it was transposed onto these documents.

Q. In other words, your calculation of ceilings in Exhibit 1 was used and applied in Plaintiff's Exhibit 2, in Column 5? A. That is right.

Q. Column 6 is entitled: Overcharge per sack. Where did that figure come from, throughout Exhibit 2?

A. That is the difference between Columns 4 and 5; the difference between the selling price and the ceiling price, computed by me. [68]

Q. Column 7 is entitled: Total Overcharges. Where did the figures come from in that column?

A. That is the figure which results from the multiplication of the number of units, for example on Lot No. 706 there would be 74 units, at 33 cents per unit, which results in an overcharge of $24.42.

(Testimony of Dave Smith)

Q. In other words, Column 6 is the overcharge per unit, and No. 7 is the total overcharge for the number of sacks sold in the particular sale listed?

A. That's right.

Miss Marten: Mr. Lerner, at this time would you like to stipulate that Columns 5, 6, and 7, be admitted into evidence in Exhibit 2? They were excluded by our prior stipulation, it seems. We have now stipulated to the admission of the calculations and ceilings on Exhibit 1 and Columns 5, 6 and 7 are merely a transposition of those figures. Can we now stipulate that all of this Exhibit 2 be admitted into evidence, insofar as it is a correct, calculation mathematically by Mr. Smith, and also correct as to the method used by Mr. Smith when he made the caluculation?

Mr. Lerner: Let me understand this clearly: In other words, the 21 per cent mark-up ceiling price, or 9-1/2 per cent, as the case would be, Exhibit 2 is actually the ceiling price that he determined, based upon the theory that he was taking the country shipper price plus what you contend was the maximum ceiling price for the freight, minus the [69] customary variations for grade and size?

Miss Marten: That is right.

Mr. Lerner: And that is doesn't represent the shipper's price plus the actual freight paid?

Miss Marten: That is right.

Mr. Lerner: I have no objection to stipulating that the amounts, insofar as they affect 100-pound sacks, as shown on the 5th column of Exhibit 2, were amounts computed by the investigator, Mr. Smith, using the basis of a country shipper plus the variations for the grades and size and service, plus a maximum price ceiling, al-

(Testimony of Dave Smith)

leged maximum price ceiling of 18 cents per hundredweight for freight, and that it does not constitute any other basis.

The Witness: There would be some 22 cent freight calculations.

Mr. Lerner: With the exception of those cases where you might have used 22 cents freight, I have no objection to stipulating to that, and the resulting alleged overcharge is merely a matter of mathematical deduction.

Miss Marten: For whatever aid it will be to the Court, it is admitted.

The Court: Does the government accept the stipulation?

Miss Marten: Yes, I do.

Mr. Lerner: May I state this, your Honor, that this stipulation is entered into by the defense on behalf of the defendants whom I am representing? There is doubt in my [70] mind as to whether in the stipulation as to Exhibit 2, whether to stipulate these were sales we made, or were sales by the Victory Produce Company. I would like to have it clearly understood that the sales were made by the Victory Produce Company, and all the stipulation is with respect to sales made by the Victory Produce Company, not the defendants I am representing.

Miss Marten: In other words, this is a transcription of the record of the Victory Produce Company?

Mr. Lerner: That is correct.

Miss Marten: That is satisfactory with us.

Mr. Lerner: So stipulated.

Miss Marten: I offer the matters contained in Exhibit 2 into evidence.

The Court: It may be received subject to stipulation.

(Testimony of Dave Smith)

(The document referred to was marked Plaintiff's Exhibit 2, and was received in evidence, subject to stipulation.)

Q. By Miss Marten: During the course of your investigation of the records of the Victory Produce Company did you learn from your investigation to what types of persons the Victory Produce Company was making sales of potatoes?

A. Their records have the names of the vendees thereon, and many of the vendees are known to me as wholesalers and retailers.

Miss Marten: Will you stipulate, Mr. Lerner, that the [71] Victory Produce Company makes sales to persons in the course of trade or business, and not to the ultimate consumers?

Mr. Lerner: For the purpose of jurisdiction?

Miss Marten: Yes.

Mr. Lerner: I will stipulate that the Court has jurisdiction.

The Court: You can't stipulate to jurisdiction, unless the facts establish it.

Mr. Lerner: That is right, your Honor. I will stipulate, insofar as the defendants I am representing are concerned, that so far as my knowledge goes the sales were made by Victory Produce Company in the course of their business.

Miss Marten. And to persons who purchase in the course of trade or business?

Mr. Lerner: Yes.

Miss Marten: The government will accept that stipulation, your Honor.

The Court: All right.

(Testimony of Dave Smith)

Miss Marten: Would you stipulate, Mr. Lerner, under the definition of Maximum Price Regulation 271 the defendants were intermediate sellers?

Mr. Lerner: No.

Miss Marten: Would you stipulate that the defendants made both cash and carry sales, and service and delivery sales, in the customary course of business?

Mr. Lerner: No, I won't stipulate that. My defendants [72] do not make any sales. Victory Produce Company may have made sales both ways.

Q. By *Mr.* Marten: From your investigation of the records of the Victory Produce Company, Mr. Smith, can you tell us if the defendants, during the period of April and May, made cash and carry sales of early white potatoes?

A. Well, from the records, and from the contact of persons making purchases, I can say that they made sales where the purchaser picked the merchandise up; that the Victory Produce Company also made sales where the Victory Produce Company delivered the merchandise to the premises where they were to be resold by the retailers.

Q. To your knowledge did they customarily make both types of sales, or were they just incidental?

Mr. Lerner: I object to the question as ambiguous, as to what is meant by the word "they"; which defendants?

Q. By Miss Marten: Did the Victory Produce Company customarily make both types of sales, or were they incidental?

A. To my knowledge they customarily made both types.

(Testimony of Dave Smith)

Mr. Lerner: If your Honor please, I am going to object to the answer upon the ground that it is not responsive. Can I get the word "they" cleared up?

The Witness: To my knowledge the Victory Produce Company made both types.

Miss Marten: That is all for the plaintiff in respect [73] to Mr. Smith.

Cross Examination

By Mr. Lerner:

Q. Mr. Smith, in the course of your investigation did you find any sales made by Mr. Sherman or Mr. Jung individually, or were all the sales by Victory Produce Company?

A. Well, the only sales I found were made by Victory Produce Company.

Q. And all the figures, compilations, and summarizations you have testified to, that you compared, or had compared either yourself or under your direction, were the result of findings of sales by the Victory Produce Company, is that correct?

A. That is correct, Mr. Lerner.

Q. I show you here what constitutes 7 Federal Register for the year 1942, bound, and taken from the library, and I direct your attention to page 9179. You worked under this particular regulation, is that correct—Maximum Price Regulation 271? A. That is correct.

Q. Under this regulation you computed the ceiling prices as you testified to, that were submitted here as an exhibit, is that right? A. That's right.

Q. 1351.1002 reads: "How a country shipper established [74] his maximum price for a perishable food commodity, as set forth in Appendix A"? A. Yes.

(Testimony of Dave Smith)

Q. 1351.1003 sets forth "How an intermediate seller calculates his maximum prices for perishable food commodities listed in Appendix B"? A. That's right.

Q. Does 1351.1003, which governs maximum prices for intermediate sellers, say anything in there about taking the country shipping base price, and adding variations?

Miss Marten: I object to that question, as immaterial. The record is a matter of judicial notice in this court.

Mr. Lerner: I think it is further argumentative, and I will withdraw that, your Honor. I have it here if the Court wishes to see it.

The Court: That is satisfactory to the Court.

Mr. Lerner: 7 Federal Register, with the original Act. I have it here, your Honor. No further questions, your Honor.

Redirect Examination

By Miss Marten:

Q. Have you ever made any other investigation at the Victory Produce Company in addition to the one which you have testified about today?

A. Yes, I have been there on other occasions.

Q. On numerous occasions? [75]

Mr. Lerner: If your Honor please, I believe these questions are immaterial, as to what other investigations may have been made.

The Court: I don't know, counsel, until we get the question developed. It may pertain to this; I don't know.

Mr. Lerner: I will withdraw my objection.

Q. By Miss Marten: Would you say these other investigations were numerous?

(Testimony of Dave Smith)

Mr. Lerner: I object to the question upon the ground that it is prejudicial.

Miss Marten: I withdraw the question.

The Court: Not numerous. Ask how many.

Q. By Miss Marten: How many times would you say you made an investigation of the Victory Produce Company?

Mr. Lerner: I am going to object to that question upon the ground that it is ambiguous, in that it does not state what the investigations were for; whether they were for potatoes.

The Court: Limit it to potatoes; that is all this Court is interested in at this time.

Miss Marten: I will withdraw the question, and reframe it.

Q. In the course of your duties as investigator with the O. P. A., did you have occasion to visit the Victory Produce Company's wholesale business?

A. I did, yes. [76]

Q. Just tell us in round figures how many times during the period that you were an investigator, have you visited the Victory Produce Company.

The Court: In connection with potatoes.

The Witness: Well, I would construe all of these as one investigation, but I came and went several times. I don't know if that is what you mean.

Q. By Miss Marten: The purpose of my question is to lead up to this question: During the times that

(Testimony of Dave Smith)

you were present at the Victory Produce Company did you observe the various employees and persons there making sales of potatoes?

A. Oh, I observed some sales of potatoes.

Q. Did you ever see Marty Sherman making a sale of potatoes?

Mr. Lerner: I am going to object to that question on this ground: That the sales of potatoes in issue were sales made during the period approximately April 12 to April 27. The testimony of Mr. Smith was that the first time he came there was in June. Therefore, it is after the period involved in this case, and would be immaterial and irrelevant.

The Court: That objection is good. He might have sold potatoes a year later; that would not establish the sale of potatoes the year before.

Mr. Lerner: The witness further has already testified that Mr. Sherman had not made any of these sales himself.

Miss Marten: Do you sustain the objection? [77]

The Court: Yes. I don't think the fact that he saw him make sales is material. He might not have owned the business, and made sales, sold potatoes a year later; that would not establish the allegations of this complaint a year before.

Q. By Miss Marten: Do you know what people make up the Victory Produce Company? Who own it?

A. Who the present owners are?

Q. Yes. A. I am sorry, I don't.

(Testimony of Dave Smith)

Q. Do you know who owned the Victory Produce Company during April and May, 1943?

Mr. Lerner: If your Honor please, that has been admitted by the pleadings.

Q. By Miss Marten: Mr. Smith, in your testimony here today you stated that these records were the records of the Victory Produce Company—the ones that you investigated. How do you know they were the records of the Victory Produce Company?

Mr. Lerner: That is argumentative. She is arguing with her own witness; I think it is objectionable on that ground.

The Court: That is calling for a fact: how does he know? How do you know these are records of the Victory Produce Company?

The Witness: Your Honor, I went to the Victory Produce [78] Company. I asked to see their records there: I mean the records of the Victory Produce Company. Those records were the ones that were furnished to me I believe in response to my request for records. Upon that I believe these were records that I did see.

The Court: That is not responsive. I will ask the reporter to repeat the question and answer.

(Record read by the reporter.)

The Court: That is responsive: all right.

Miss Marten: That is all with this witness.

The Court: Call your next witness.

(Witness excused.)

Miss Marten: Will Mr. Sherman take the stand?

Mr. Lerner: Is this under 2055, or a witness under subpoena?

Miss Marten: Under 2055.

MARTY SHERMAN,

a witness called by and on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Marty Sherman.

Direct Examination

By Miss Marten:

Q. Mr. Sherman, what is your occupation?

A. Wholesale fruit and produce.

Q. How long have you been engaged in that business? |79| A. About 22 years.

Q. Under what name do you carry on this business?

A. Under what name?

Q. Yes. Do you carry on your wholesale business under the name of Marty Sherman?

A. No, I do not.

Q. What name do you carry it on under?

A. Victory Produce Company.

Q. How long have you carried on a wholesale produce business under the name of Victory Produce Company?

A. Well, I personally haven't carried that business under my name at all. I happen to be a partner in the Victory Produce Company for the past year and a half.

Q. When did you first become a partner in the Victory Produce Company? A. April 5, 1943.

Q. Who were the other partners with you in the Victory Produce Company at that time?

Mr. Lerner: If your Honor please, I am going to object to this question, upon the ground that it is immaterial; further for the reason that the Victory Produce Company is not a party defendant to the action. He is being sued here individually, and doing business as Victory Produce Company. He can testify as to what he

(Testimony of Marty Sherman)

was doing; but I submit, your Honor, that the company is not a party before the Court, and that the issues are not before this Court insofar as the [80] partnership is concerned.

The Court: Overruled. Exception allowed the defendants. Proceed.

Miss Marten: Answer the question.

(Question read by the reporter.)

The Court: That was April 5, 1943, Mr. Sherman?

The Witness: Yes, your Honor.

A. Marvin Berry and Jim Jung.

Q. By Miss Marten: Is Jim Jung still a partner with you in the Victory Produce Company? A. Yes.

Q. Is Marvin Berry still a partner with you in the Victory Produce Company? A. No.

Mr. Lerner: If your Honor please, I am going to object to that question upon the ground that there is a different Victory Produce Company now than there was in existence at the time this action was filed.

The Court: That is what we are trying to find out.

Miss Marten: I will withdraw that, and reframe it. What was the last question?

(Question read by the reporter.)

Mr. Lerner: The question of who constitutes the partners is not denied by the pleadings. Under Paragraph 4, page 2, of plaintiff's pleading, it is alleged:

> "At all times mentioned herein defendants Jim [81] Jung, Marty Sherman and Marvin Berry were co-partners doing business as Victory Produce Company,"

and in the answer of the defendants, which they have filed, this was not denied. The question, therefore, is immaterial at this time.

(Testimony of Marty Sherman)

The Court: If it is admitted, then you don't need to ask him.

Miss Marten: We will accept the stipulation of the pleadings, that they are in that form.

The Court: All right.

Q. By Miss Marten: How long did the partnership of yourself, Jim Jung and Marvin Berry, which you formed on April 5, 1943 continue in existence?

A. Roughly, about two weeks, but the dissolvement was not completed until some 75 days after we got together, I believe.

Mr. Lerner: If your Honor please, it is a matter of record. The record speaks for itself. I am willing to stipulate that on September 30, 1943, the partnership, consisting of Jim Jung, Marty Sherman and Marvin Berry, was dissolved of record.

Miss Marten: We will accept the stipulation, your Honor.

Q. By Miss Marten: During April and May of 1943, Mr. Sherman, did you personally make any sales of potatoes in the wholesale produce business? [82]

A. No, ma'am.

Q. How did you make the sales of potatoes in your wholesale produce business?

A. We had a potato salesman there that handled all the potato sales during that period.

Q. What was his name?

A. David Rosen, I believe.

Q. Was he the only man that sold potatoes at that time?

A. I wouldn't be in a position to say that, because there were 8 or 9 other salesmen around the house that may have sold some besides what he did.

(Testimony of Marty Sherman)

Q. Did Mr. Jim Jung, one of your partners, ever personally make any sales of potatoes?

A. So far as I know, I don't think he did.

Q. What about Marvin Berry?

A. He was never there.

Q. Do you know what persons the sales were made to during April and May, 1943, in a general way?

A. They were made to everybody who sold them.

Q. Were they made to other wholesalers?

Mr. Lerner: If your Honor please, the record speaks for itself, as to whom sales were made, and that would be the best evidence. I further object upon the ground that it is immaterial as to whom they were made.

Miss Marten: We did not read any records themselves [83] into evidence. We merely have a summary and the testimony of the witness.

Mr. Lerner: Plaintiff is attempting to rely upon the summary of their own witness, their own agents. We stipulated and permitted them to rely upon that testimony, and I don't see why they should go back on their testimony at this time.

Miss Marten: The purpose of asking this question, your Honor, is, I understand counsel does not care to stipulate that the Victory Produce Company was selling potatoes as an intermediate seller.

The Court: That is right. Proceed.

Q. By Miss Marten: Did the Victory Produce Company make sales to other wholesalers?

A. They made a lot of sales. Some wholesalers may have bought some, but the biggest majority of them were sold to retailers.

(Testimony of Marty Sherman)

Q. Did the Victory Produce Company make cash and carry sales to both wholesalers and retailers?

A. I don't know what constitutes a cash and carry sale.

Q. Did the Victory Produce Company makes sales to persons who came to your place of business and picked up the merchandise and paid cash to the Victory Produce Company?

A. The Victory Produce Company made sales of potatoes to people who came into the store, for cash, which were [84] delivered to them, yes. Nobody picks anything up at the Victory Produce Company but what the Victory employees don't deliver.

Mr. Lerner: If your Honor please, I think we are going to get into some technical questions as to what constitutes delivery, and what does not. I am willing to stipulate to this, your Honor: I stipulate on behalf of my defendants that insofar as we know Victory Produce Company as a company made sales to retailers and to other wholesalers; that in some instances some of the sales were sold and cash was paid at the time of the sale, and in other cases sales were made, and were charged upon the books, and collected under the usual or customary market terms.

Miss Marten: We accept that stipulation. Would you stipulate that some of the sales were picked up at the Victory Produce Company, and other sales were delivered by the Victory Produce Company?

Mr. Lerner: If we agree on the question of delivery, —in all cases there has to be a technical delivery, and in some cases the potatoes were delivered by the Victory Produce Company, to the best of our knowledge.

(Testimony of Marty Sherman)

Miss Marten: We will accept that stipulation.

Mr. Lerner: And picked up at the dock after it was delivered to the customer. In other cases motor vehicles and hand trucks were used to make deliveries of the potatoes away from the premises. Whatever the legal effect of that [85] would be, is something I would not stipulate to.

Miss Marten: You will stipulate to those facts?

Mr. Lerner: Yes.

Miss Marten: The government will accept the stipulation of facts.

The Court: All right.

Q. By Miss Marten: Mr. Sherman, can you tell us how you arrived at your ceiling price for potatoes which the Victory Produce Company sold during April and May, 1943?

A. Well, we based the cost of the potatoes delivered to Los Angeles.

Mr. Lerner: I am going to object to that question upon the ground that the question calls for an answer which affects not Marty Sherman individually, insofar as he is concerned. Any testimony that he as an individual would give would not bind him as an individual. It calls for action done by the partnership. The partnership is not a defendant to the action. Therefore, it is immaterial as to how they did it, or what they did.

The Court: Overruled. How did you fix the cost of your potatoes?

The Witness: On the purchase price delivered to Los Angeles. We then added ours, according to the O. P. A. ruling, of 21 per cent for potatoes that we delivered, and 9-1/2 per cent for the potatoes that were sold at the dock.

Miss Marten: That is all, Mr. Sherman. [86]

Mr. Lerner: No further questions, your Honor.

Mr. Handy: May it please your Honor, I understand from Miss Marten those are all the witnesses we have here at the present time. However, there was a question raised this morning; I think at least it was hinted at in counsel's cross examination of one of the witnesses, as to the availability of cars by the common carrier, by the railroad. The railroad man said he was not able to testify whether there were any available. Our contention, our theory, is that that burden is placed upon the defendants, and not upon us. I don't think we have to show that the railroad company at a particular time did not have a certain number of cars on the track. We would have to know what they wanted to ship; how they wanted to ship, and all that knowledge would be knowledge of the defendants. We believe the Court must take judicial knowledge that a public carrier, such as a railroad, has cars for the needs of the public. If that is not true, I think it is on the defendants to show that.

The Court: Weren't all the deliveries from the Bakersfield area made by truck?

Mr. Handy: They were made by truck. I think one question of law we are going to have to argue is not only whether or not 18 or 30 cents truck price was correct, but whether any of this was because, even though they shipped by truck, they should not have taken the common carrier's 22 cents—15 plus 7. That is something we will point out to your [87] Honor when we come to analyze the regulation. We have called a railroad man to come down here, who can testify in a general way what cars were available, and so forth, at this particular time. We don't want to do that unless your Honor feels it is incumbent upon us. If there is any reason to believe that

there were not available cars by a common carrier, such as the Southern Pacific, or the Pacific Fruit *Exchange,* I think it would be upon the defendants to show that.

(Discussion.)

The Court: I just wanted your general theory. Proceed.

Mr. Handy: We rest, your Honor.

Mr. Lerner: If your Honor please, at this time I would like to renew my motion to strike, and go into a discussion of that matter. I would like to move, your Honor, that all the evidence presented by plaintiff in this action, insofar as it reflects or shows sales or transactions made by Victory Produce Company as such be stricken from the record for the reason that the Victory Produce Company is not a party defendant to the action here, and is not before the Court at this time; that the Court would have no jurisdiction to render judgment against the Victory Produce Company as a company.

Los Angeles, California, Wednesday, November 1, 1944. 2 P. M.

Mr. Lerner: If your Honor please, at this time I would like to renew my motion to strike, and go into a discussion of that matter. I would like to move, your Honor, that all the evidence presented by plaintiff in this action, in so far as it reflects or shows sales or transactions made by Victory Produce Company, as such, be stricken from the record for the reason that the Victory Produce Company is not a party defendant to the action here, and is not before the court at this time; that the court would have no jurisdiction to render judgment against Victory Produce Company as a company.

I base my argument upon a reading of Rule 17, Federal Rules of Civil Procedure, which reads as follows; I have already read it once to the court, but for the purpose of continuity I will repeat it. Rule 17 (b):

> "Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, [94] which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

And, therefore, clearly, under Rule 17 (b), in a case of this character, the court would be bound by the rules laid down by the State of California, and we would have to follow those rules. Looking to our California courts we find that in order to sue the Victory Produce Company, as a company, we must come within Rule 388 of the Code of Civil Procedure, which recites as follows:

> "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all of

the associates and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

California cases tend clearly to hold that a partnership is a legal entity for the purpose of suit, and in order [95] to bring the parties within the action, and in order to bring the partnership within the action, the Victory Produce Company must be named as a party defendant. That the manner in which the action was brought, in this case, is an action against individuals. The title reads as follows:

"Chester Bowles, Administrator, Office of Price Administration, Plaintiff, vs. Jim Jung, Marty Sherman and Marvin Berry, individually and doing business as Victory Produce Company, Defendants."

There is no action here against Victory Produce Company as a company, but merely against the individuals doing business as Victory Produce Company. I refer the court's attention to certain of the cases. We have here before us the case of Artana v. San Jose Scavenger Co., 181 Cal. 628. I would like to read from the actual cases, if I may, your Honor.

In this action there was a demurrer to the complaint.

"The action was brought against the copartnership alone as a legal entity, under the provisions of Section 388 of the Code of Civil Procedure, which provides that 'when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common

name, the summons in such cases being served on one or more of the associates.' Concededly the [96] provisions of this section authorize an action against a copartnership by its common name, the section recognizing a copartnership as a distinct legal entity for the purposes thereof. The action was one to have the interest of the plaintiff, claimed to have been acquired by purchase at an execution sale of the interest of one of the partners in the copartnership, ascertained, and for an accounting. The record does not show how summons was served on the partnership defendant, or, indeed, that it was ever served on any of the partners. However, a demurrer was interposed to the complaint by one Peter Devincenzi who was not named in the complaint, describing himself as 'sued as Santa Fe Scavenger Company, a copartnership.' This demurrer purported to be the demurrer of the said Devincenzi alone, as an individual, and did not purport to be the demurrer of the defendant partnership. Plaintiff thereupon made a motion for an order striking such demurrer from the files on the ground that Devincenzi is 'a stranger to the action and not a party thereto and upon the further ground that the said demurrer is sham.' This motion was denied. The demurrer was thereafter sustained and judgment given 'that plaintiff take nothing by his said complaint,' and 'that the said [97] action be dismissed.' This is the judgment appealed from.

"We see no good answer to the claim of appellant seasonably made, and ever since insisted on, that the attempted demurrer was not entitled to be considered. It did not purport to be the demurrer of any party to the action, for the only party de-

fendant was the Santa Fe Scavenger Company, a partnership, which, for the purposes of the statute (Code Civ. Proc. Sec. 388) is regarded as a legal entity distinct from its members. Although, by virtue of the amendment of the section in 1907, the judgment in an action so brought binds not only the joint property of the associates, but also the individual property of the party or parties served with process, it is still true that the action contemplated by the section is one against the associates as such to enforce a claim existing against the association, and is not an action against the individual members of the association; that is, unless they are as individuals, made parties thereto. The association, whether it be a copartnership or other association of individuals transacting business under a common name, is, for the purposes of the section, a legal entity distinct from its [98] members, and it is this legal entity which is in this action the sole party defendant.

"See, generally, Bollman Co. v. Bachman & Co., 16 Cal. App. 589, 591. The record does not show that Devincenzi was one of the associates or partners, and the complaint does not purport to state any cause of action against him. So far as the record shows he is an absolute stranger to the action. Certainly his demurrer as an individual is not the demurrer of the sole defendant in the action, viz., the Santa Fe Scavenger Co., a copartnership."

This case clearly brings out, if your Honor please, first, that there is a separate distinct entity. It is the reverse of the position we have here. However, it is one of the leading cases confirming the doctrine of a distinct entity.

I would like to cite the case of John Bollman Co. v. S. Bachman & Co., 16 Cal. App., 589. In this action, the original action was by The John Bollman Company, a corporation, Plaintiff, vs. S. Bachman & Company, a copartnership. I might state briefly, without reading it, the substance of it.

In this action no attempt was made in the original complaint to allege who comprised the copartnership. The prayer was for judgment against "the defendant." The action [99] was brought under Section 388, Code of Civil Procedure. After the Statute of Limitations had run against the action the plaintiff filed an amendment to his complaint, and in the amended complaint he changed the title to read "The John Bollman Company, a corporation, Plaintiff, vs. S. Bachman & Company, a copartnership, Simon Bachman and Arthur Bachman, copartners doing business under the firm name of S. Bachman & Company, Defendants." Now, we then had in the amended complaint S. Bachman & Company, a fictitious firm name, a copartnership; we also in addition to that had the individual copartners doing business under the firm name of S. Bachman & Company, defendants, instead of the above. The amended complaint also contained appropriate allegations charging the individuals, Simon Bachman and Arthur Bachman, copartners doing business under the firm name of S. Bachman & Company.

A demurrer was filed by Arthur Bachman and Simon Bachman to the amended complaint. The demurrer was sustained without leave to amend. A judgment was entered against S. Bachman & Company, a copartnership. The court held in that case that both questions were to be answered by the question of whether or not the amended complaint brought in new defendants. Appellant

contended that there was no new cause of action stated by the amended complaint, but contended that by the addition of Simon Bachman and Arthur Bachman as parties defendant new parties were brought in, [100] and it was merely an elaboration of the name of the defendant company. The court said:

> "While it is true that the section says the associates may be sued by such common name, the whole section indicates that the action in substance is an action against the associates as such and not against the individuals. The section recognizes the association, or, as in this case, the copartnership, as a distinct entity, against which the partnership obligation may be enforced. In an action brought as this was, the partnership is the only defendant."

And that by naming the defendants, Arthur Bachman and Simon Bachman, copartners doing business under the firm name of S. Bachman & Company, it constituted bringing in separate parties, new and distinct parties, separate entirely from the defendant company as a company; and the sustaining of the demurrer was thereupon affirmed.

We have a similar situation in this case, your Honor. The case here is against Jim Jung, Marty Sherman and Marvin Berry, doing business as Victory Produce Company. Under the ruling in Bollman vs. Bachman they are not suing the partnership as the legal entity; they are suing the individuals. The words have been held to mean they are words of description, showing the nature of their operation, but the actual partnership is not a party to the action; that the action is [101] one against the individuals as such.

Now, we have the case of Mary J. Craig v. San Fernando Furniture Co., 89 Cal. App. 169. This was an action which arose out of an automobile collision. The original action was against the San Fernando Furniture Company, a corporation, and Ira E. Stewart, an employee who was driving the truck for the defendant corporation. After the filing of the action, and after the Statute of Limitations had run, plaintiff filed an amendment to its complaint reading:

> "Mary J. Craig, Plaintiff, v. San Fernado Furniture Company, Alex Cohen, Louis Cohen and Morris Cohen, copartners doing business under the firm name and style of San Fernando Furniture Company, and Ira E. Stewart, Defendants."

The first paragraph of the amended complaint was changed to read as follows:

> "That at all times mentioned herein the defendant San Fernando Furniture Company was and now is a copartnership; that Alex Cohen, Louis Cohen and Morris Cohen are the names of the persons comprising such copartnership and that said Alex Cohen, Louis Cohen and Morris Cohen now are and at all times mentioned herein were associated together in the retail furniture business in the City of Los Angeles, California, transacting such business under the firm name [102] and style of San Fernando Furniture Company: that said associates Alex Cohen, Louis Cohen and Morris Cohen are sued herein under said firm name and style of San Fernando Furniture Company pursuant to Section 388 of the Code of Civil Procedure of the State of California.

> "That at all times mentioned herein the defendant Ira E. Stewart was the employee of said San Fernando Furniture Company, a copartnership, and of Alex Cohen, Louis Cohen and Morris Cohen, doing business under the firm name of San Fernando Furniture Company and that said Ira E. Stewart at all times mentioned herein was acting as a driver of the automobile truck belonging to said San Fernando Furniture Company and the said Alex Cohen, Louis Cohen and Morris Cohen, doing business under said common name."

In this action the court held that there was no right on the part of plaintiff to amend the complaint; that it was beyond the Statute of Limitations; that by amending their complaint and bringing in the parties Alex Cohen, Louis Cohen and Morris Cohen, doing business under the common name of San Fernando Furniture Company, they were, in effect, bringing in new parties to the action; that they were separate and distinct from the legal entity, and confirmed the legal entity as provided by Section 388 of the Code of [103] Civil Procedure as it existed in California. The court went into considerable discussion with respect to comparative cases in other jurisdictions, but the principal rule of the entity of the partnership, as a separate and distinct entity was definitely recognized in this state, and that Stewart, who was an employee of the defendant company was, in effect, not an employee of the individuals, but was an agent of the company, and as such agent of the company he was not the agent of the individuals. They recognized that distinction; in other words,

he was the agent of a recognized legal entity, even from the standpoint of agency under the California Act. The court in that case cited numerous other cases, and also cited the Santa Fe Scavenger Company case. I might state this; on page 176 the court said:

> "It is still true that the action contemplated by the section is one against the associates as such to enforce a claim existing against the association, and is not an action against the individual members of the association."

I also cite the case of Ferry v. North Pacific Stages, 112 Cal. App. 348. This is the case of W. J. Ferry vs. North Pacific Stages (a corporation) et al; Seattle-Portland-San Francisco Auto Stage Co. (a corporation); and after the complaint was filed it was discovered that the Seattle-Portland-San Francisco Stage Co., instead of being [104] a corporation was a copartnership, and that the members of the copartnership were D. M. Shattuck and John Doe Christie. Summons was duly issued. An affidavit of service of summons was filed reciting that process in said cause was personally served upon "Fred Gordon, a member of said association." Fred Gordon appeared personally and answered the complaint. The defendant Seattle-Portland-San Francisco Auto Stage Company did not appear or answer as a corporation, as an association, or at all. This was prior to the amendment to the complaint. Then they amended their complaint to include Shattuck and Christie, and they named them as follows: D. M. Shattuck and John Christie, doing business under the firm name and style of Seattle-Portland-

San Francisco Auto Stage Co. And in paragraph III of the complaint they further alleged:

> "D. M. Shattuck, John Doe Christie * * * were at all times * * * and still are associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Co."

The court held in that case:

> "The remaining question is, was the Seattle-Portland-San Francisco Auto Stage Company also made a party defendant as an association or partnership? Did the court have jurisdiction of this company as an association? It is true paragraph [105] III of the complaint further alleges, 'D. M. Shattuck, John Doe Christie * * * were at all times * * * and still are associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Co.' It is also true the title to the complaint includes these last-named individuals as party defendants. The foregoing language clearly indicates it was the intention of the pleader to constitute these named individuals as party defendants. They are merely identified as doing business in the name of the Seattle-Portland-San Francisco Auto Stage Company. The company as a separate entity is not made a party defendant. To have included this last-named company as a party defendant independent of the individuals who are alleged to compose the organization, it should have been specifically named as a defendant. This was not done. Our courts have uniformly held, without exception, that similar descriptions of individuals as members of an

association or partnership, does not constitute the organization itself a party to the action. This is not an action pursuant to the provisions of Section 388 of the Code of Civil Procedure against the 'common name' under [106] which individuals are associated and doing business. (Davidson v. Knox, 67 Cal., 143; Feder v. Epstein, 69 Cal., 496, Maclay Co. v. Meads, 14 Cal. App. 363.)"

The Court: They are just along the same line?

Mr. Lerner: They are all along the same line.

The Court: There is no need to argue further on those.

Mr. Lerner: If the court is satisfied, there is no need of going into further detail on those.

The Court: No, if they are cumulative cases.

Mr. Lerner: Might I point to the comparison the court makes in Maclay Co. v. Meads, wherein the court said this:—

The Court: You did not give the citation.

Mr. Lerner: 14 Cal. App. 363, 112 Pac. 195. The court in that case said this: It will be seen—

The Court: Counsel, I assume it is the same statement you have read; there is no need of reading these cumulative cases.

Mr. Lerner: I won't impose upon the court further. I will cite the cases of Davidson v. Knox, 67 Cal., 143; Feder v. Epstein, 69 Cal., 456, 10 Pac. 783; also a recent case, 1943, Debois v. Hotel and Apartment Clerks' Union 134 Pac. 2nd 328. That case is not exactly in point, but it does affirm the legal entity rule established in the previous cases.

We, therefore, find this, if your Honor please: That in the cases in California, and under Rule 17 (b), in order for the plaintiff to have established a case against the [107] Victory Produce Company, they must have shown that the defendants Marty Sherman, Jim Jung and Marvin Berry, as individuals, made sales in violation of the price ceiling. Without conceding for one moment that any violation did take place, the fact still remains, if your Honor please, that they have no party defendant here before the court by the name of Victory Produce Company. They don't have all of the defendants who composed the Victory Produce Company. They only have two of them before the court. They can't bind them jointly. Therefore, it is not possible to get judgment against the Victory Produce Company, and for that reason, any evidence as against the Victory Produce Company should be dismissed in so far as any action against the Victory Produce Company is concerned.

In view of the fact that all of the evidence tends to show sales made on transactions which took place by Victory Produce Company, rather than by individuals as such, in so far as this evidence introduced has no relationship or bearing, or establishes a case against the individuals, as individuals, the case against the individuals must be dismissed, and this motion is being made on behalf of the individuals as such.

Mr. Handy: I am sorry, your Honor, I am taken a little unawares by this motion, because I did not anticipate it. I did not draw the pleadings; the matter was never raised or discussed, and I am not as familiar as counsel is on this [108] particular issue. I may state at the beginning, if your Honor has any doubts about it, I would appreciate it if we might take the evidence, and

then be permitted to file a memorandum with your Honor. However, I will state this is not my pleading, but is a national form which has been wished on us. I don't particularly like the form of pleading myself. It isn't consistent with our usual California allegations, in the title, when we are suing a partnership, and I have made some changes in that regard heretofore, but not in this case.

Your Honor, of course, appreciates, having practiced long before the courts of California, that our rule in California is that we allege John Doe and Richard Roe individually, when we want to sue them individually, and John Doe and Richard Roe, a copartnership, doing business as the John Doe Company. That is the ordinary method of alleging both an individual and partnership liability.

In the action that we have here today, it is set up in the complaint the way it is in the title; that is, "Jim Jung, Marty Sherman and Marvin Berry, individually"; certainly, that makes them individual defendants, and the allegations of the complaint would apply to them individually. Then it goes on in the title and says "and doing business as Victory Produce Company." Then in paragraph IV of the complaint, the allegation is:

> "At all times mentioned herein defendants Jim [109] Jung, Marty Sherman and Marvin Berry were co-partners doing business as Victory Produce Company, with the principal place of business located at 1124 South San Julian Street, Los Angeles, California,"

and that allegation is admited by the answer.

The whole question then is, whether or not it is necessary to allege in the title, which is no part of the complaint, the fact that persons are a copartnership. Had we said "Individually, and as a copartnership doing business as Victory Produce Company" I take it there could be absolutely no question about the fact that both were brought in; but by leaving out in the title as to whether or not they were copartners, and this was a joint venture —it would seem very much as though it were a joint venture by the testimony on the stand—while they did have an agreement, one man came in at the beginning of the season, and went out at the end of the season; so it may either have been a joint venture, but whether or not, by failing to put in those words, "a copartnership doing business"—whether or not we have brought them in as parties is the question we are concerned with. Rule 9 (a) of the Federal Rules of Civil Procedure provides as follows:

> "It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative [110] capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of a party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are particularly within the pleader's knowledge."

We believe that our pleading comes squarely within Rule 9 (a) of this court. We also believe it comes squarely

within the provisions of Rule 17 (b) quoted by the defendant. The capacity to sue or be sued, of course, is determined by the jurisdiction in which the court is located, but Rule 17 (b), as read by the defendants, states:

> "except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

I don't think that particularly applies, because in this state the capacity to sue comes under the provisions of the Code of Civil Procedure, which were read by the defendants, [111] and I think our pleading comes squarely under that section, because we have sued them individually, and by their firm name "Victory Produce Company."

I intended, as a matter of fact, at the noon hour to run down some of these cases, but I did not get very far. There is a case in 13 Cal. App. (2d), 440. I looked at the digest, but I did not get a chance to read the case. I am not sure just what it holds, or whether it comes within the issues here, but the digest there seemed to be that where parties were sued, and the capacity was not mentioned, they had not brought in the partnership; but it does, if they had mentioned the partnership name, which in this case was Karl's. I don't know whether it is the Karl Shoe Company or not: but it would not be sufficient if they had merely designated the defendants as "Karl's doing business under the name of Karl's." I am not very sure whether that would cover the situation, but I think we come squarely within the provisions of Rule

9 (a); if your Honor has any question about it, I would like to get the recent rulings on the matter.

The Court: I will hear the testimony.

Mr. Lerner: If your Honor please, I might say in connection with the case cited by counsel, that I have read that case, and that is a situation where they name a company without specifying the name. Then the evidence showed that the plaintiff bringing the action knew the name [112] of the defendant company, and merely hadn't specified the name. In other words, they sued a company composed of two parties who were mentioned, but it turned out that the company was Karl's, and was a copartnership. They held that by using the words "and company" they had named a fictitious name, without naming the name of the company.

The Court: I will hear the testimony, without prejudice. Exception allowed [88]

Mr. Lerner: At this time, your Honor, I would like to make a motion for a dismissal and a nonsuit on behalf of the defendants named whom I am representing, upon the grounds that there has been no evidence, or, assuming that the evidence introduced is correct, it still does not establish a case against the defendants Marty Sherman or Jim Jung, either individually, or doing business as the Victory Produce Company. For the purpose of this motion, if your Honor please, I would like to repeat my arguments in connection with the situation of the partnership as to whether or not a partnership is brought in.

The Court: So understood.

Mr. Lerner: In addition to that, your Honor, I would like to point out to the court, if I may, that to determine whether or not plaintiffs have stated a cause of action,

assuming even their proof were correct,—whether or not they have stated a cause of action against Marty Sherman and Jim Jung, individually, and doing business as the [113] Victory Produce Company. I would like to call the court's attention first to regulation 271. In 7 Federal Register, 9179, the original regulation was published and made official. I might state this: There is only one amendment that affects the regulation as it was originally issued. That is No. 9, in so far as the issues before this court are concerned, and amendment No. 9 affects it only to the extent that there is a change in the event of icing car lots.

Miss Marten: I don't agree to that.

Mr. Lerner: I am sure; but I can bring in the amendment. Federal Register, Vol. 7, page 9179 sets forth price regulation 271 as follows:

> "Certain perishable food commodities, sales except at retail.
>
> "In the judgment of the Price Administrator it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250, that maximum prices be established for the sale of certain perishable food commodities f. o. b. country shipping point, and at wholesale. The following regulation supersedes Temporary Maximum Price Regulation."

However, going to the matter of the substance of the regulation we find as follows, if your Honor please: We have the regulation, or the body which is in a position to [114] establish the law. I recognize the fact that the regulation is the law, and the Administrator is the agent, bringing about the details, which are set out in Sections 1351.1001 to 1351.1018.

The Court: You are going too fast.

Mr. Lerner: The regulation sets out, and subdivides its substance into 18 subsections, each one separate, clear and distinct. First is subsection 1. When I say subsection 1, I mean this is 1351.1001. The numerical series are right at the end, and shows the applicability of this maximum price regulation.

> "(a) Commodities to be priced under this regulation. This regulation applies to the following perishable food commodities:
>
> "(1) All white flesh potatoes, whether used for human consumption or as seed potatoes.
>
> "(2) All dry onions used for human consumption, produced in the calendar year 1942.
>
> "(b) To what types of sellers this regulation applies. This regulation applies to country shippers and all intermediate sellers, as defined herein, of the commodities listed in paragraph (a) of this section, but does not apply to retailers."

Subsection (c) of 1351.1001, states the purposes of this regulation as follows: [115]

> "(c) Purposes of this regulation. (1) Appendix A sets forth maximum prices and repeats the applicable differentials set forth in Sec. 1351.1002 (b) for the country shipper, at the country shipping point, on board car or any other common carrier, for each variety and grade, in the month of sale and area in which the commodities were produced.
>
> "(2) Appendix B sets forth the figures which different classes of intermediate sellers must use in calculating maximum prices."

Then we have in (d) prohibition against sales above maximum prices.

Then we have 1351.1002. The first one from which I quoted is very general, covering all. Then 1351.1002 sets down:

> "How a country shipper establishes his maximum price for a perishable food commodity, as set forth in Appendix A."

The regulation goes to a great extent in showing how to establish the grades, varieties, sizes, size of package, services rendered, whether it is a delivered basis or country shipping point basis, what he may add, and what he has to deduct.

Sec. 1351.1003 is:

> "How an intermediate seller calculates his [116] maximum prices for perishable food commodities listed in Appendix B."

Now, 1351.1002 states how a country shipper shall arrive at his prices, and in 1351.1003 how an intermediate seller shall arrive at his prices, and we have a separate appendix to which he must refer. He is directed specifically, not to Appendix A, but Appendix B. In Section 1351.1003 we find first:

> "For the purposes of this regulation 'intermediate sellers' are divided into the following classes."

Then they define who is an intermediate seller:

> "and the term means any wholesale seller, including, but not limited to terminal distributors, service and cash-and-carry wholesalers, carlot receivers, jobbers or any other person who purchases for the purpose of reselling, except country shippers and retailers."

You will notice specifically that "country shipper" is set aside and distinguished from "intermediate seller" just as "retailer" is set aside and distinguished from "intermediate seller" and "country shipper". Then they say as follows:

> "except country shippers and retailers, and who take title and make sales to any person who is not the ultimate consumer."

In other words, anyone between the country shipper and [117] the ultimate consumer, with the exception of the retailer, is considered an intermediate seller. There is no question in my mind that the Victory Produce Company, while they were selling potatoes, acted as intermediate sellers, because it was intended under the act that everybody be considered an intermediate seller. They are either in one group or the other. Then they attempt to define and separate into three classes all intermediate sellers. They say:

> "(1) Class 1: Retailer-owned cooperative wholesaler. A retailer-owned cooperative wholesale is either a non-profit organization or a corporation, 51% or more of the stock of which is owned by its retail customers and which distributes food commodities for resale without materially changing their form."

Well, clearly that does not affect the problem before the court at this time.

> "(2) Class 2: Cash and carry wholesalers. Cash-and-carry wholesaler is a wholesaler not in Class 1," that is, not a cooperative, "who distributes food commodities for resale or to commercial, industrial and institutional users without materially changing their

form and who does not customarily deliver or extend credit.

"(3) Class 3: Service Wholesalers. A service wholesaler is a wholesaler not in class [118] 1 who distributes food commodities for resale or to commercial, industrial or institutional users without materially changing their form and who customarily delivers, or delivers and extends credit to purchasers.

"(b) The intermediate seller shall calculate once every week on the day set forth opposite the name of the food commodity in Appendix B his maximum price for each variety and grade of such food commodity as follows:"

Assuming we are now an intermediate seller, the first step we must determine is how we start to determine our prices.

The Court: Counsel, I will have to go over those pretty carefully anyway, so I will hear the testimony. We will proceed with the case. I will allow you an exception without prejudice to making a motion, and I will hear argument at the conclusion of the testimony. [119]

The Court: I will hear the testimony. We will proceed with the case. I will allow an exception, without prejudice to make a motion, and I will hear argument again at the conclusion of the testimony.

Mr. Lerner: I would like to introduce the testimony of Mr. Sherman on behalf of the defendants I am representing.

MARTY SHERMAN

called as a witness by and on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Lerner:

Q. Mr. Sherman, you are one of the defendants named in this action? [89] A. Yes, sir.

Q. Do you, as an individual, and for your own behalf, buy any potatoes for the purpose of resale?

A. No, sir.

Q. Do you as an individual sell any potatoes or on your own behalf? A. No, sir.

Q. Do you have anybody working for you individually who sold any potatoes? A. No, I do not.

Q. The answer is no, I take it?

A. No, I didn't.

Q. Are you familiar, generally speaking, with the transactions of the Victory Produce Company during the period from April, 1943 to the latter part of May, 1943?

A. I am.

Q. Do you know how the Victory Produce Company arrived at its price ceiling on potatoes during that period?

A. I do.

Q. Will you tell the Court how they arrived at the price ceiling, to the best of your knowledge?

A. Well, there is only one way that they can arrive at the price ceiling, and that is by the purchasing of the potatoes. The Victory Produce Company purchased these potatoes from the country shipper on a delivered basis, at whatever the price was at the time of delivery. The Victory [90] Produce Company had the privilege of putting on their markups, which was O. K.'d by the O. P. A., of

(Testimony of Marty Sherman)

21 per cent on a delivered basis, and 9-1/2 per cent on what they call the cash and carry basis.

Mr. Handy: I object to the statement that they had the privilege of doing this.

The Court: He is a layman. He doesn't understand legal terminology. You mean that's the way you made your price?

The Witness: That is right, your Honor.

Mr. Lerner: No further questions.

Cross-Examination

By Mr. Handy:

Q. Mr. Sherman, when you spoke of being O. K.'d by the O. P. A., do you mean a particular price was submitted to the O. P. A., or are you referring to the provisions of the regulation?

A. Before we start selling any potatoes at the Victory Produce Company we contact the O. P. A.

Q. Who do you contact?

Mr. Lerner: If your Honor please, I believe that is immaterial, because any evidence they might introduce in that respect could not be binding against the government. The theory of estoppel is an improper theory. The rules and regulations provide, in order to get a price quotation binding the Office of Price Administration must be in writing, [91] and must be by a recognized authority of the Office of Price Administration. That very question came up, if your Honor please, in Judge Yankwich's court, and the court held that any statements that could possibly be made, or any conversation that could possibly have taken place between a citizen, and the Office of Price Administration, or its representative, unless it was in

writing, could have no possible legal effect, and therefore any statements made by the witness at this time have no legal effect, and should be excluded by the Court.

The Court: Proceed.

Mr. Handy: The position of counsel has saved considerable cross examination, your Honor. I think that is all. The plaintiff rests, your Honor. [92]

[Endorsed]: Filed Mar. 29, 1945.

[Endorsed]: No. 11035. United States Circuit Court of Appeals for the Ninth Circuit. Jim Jung and Marty Sherman, Appellants, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed April 11, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Circuit Court of Appeals of the United States
Ninth Circuit

No. 11035

JIM JUNG and MARTY SHERMAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

STATEMENT OF POINTS

The appellants, Jim Jung and Marty Sherman, state that the points upon which they intend to rely on the appeal in this action are as follows:

1. The Trial Court erred in awarding a judgment against appellants, Jim Jung and Marty Sherman, because the partnership, known as Victory Produce Company, consisting of Jim Jung, Marty Sherman and Marvin Berry, which was the only entity against which judgment might have been awarded, was not a party to the action.

2. The Trial Court erred in determining that it was obligatory upon the "intermediate seller" to inquire into the propriety of the freight rate included by the "country shipper" in the price of the potatoes purchased by the "intermediate seller" upon a "delivered" basis.

3. The evidence was insufficient to support the judgment against appellants in the following respects:

a. The evidence failed to show that the appellants, Jim Jung or Marty Sherman, made any sales of potatoes,

or that they were personally liable for any violations of the provisions of Maximum Price Regulation 271, as amended.

b. The evidence failed to show that the Victory Produce Company, as the "intermediate seller", sold in excess of its "ceiling price" within the meaning of the provisions of Maximum Price Regulation 271, as amended.

c. The evidence failed to show which of the sales made by the Victory Produce Company were upon a "service and delivery" basis and which were upon a "cash and carry" basis within the meaning of Section 1351.1018 of Maximum Price Regulation 271, as amended.

d. Appellee failed to introduce any evidence to show what the country shipper's "lowest available common carrier rate" was with respect to the potatoes shipped by him to the customary receiving point of the Victory Produce Company during April and May, 1943.

4. The Court erred in admitting and in refusing to strike out the following evidence:

a. The freight rates in April and May, 1943, charged for the shipping of potatoes from the Bakersfield area to Los Angeles, California.

b. The price charged by Edison Trucking Company, or any other trucking company, for the hauling of potatoes from Kern County to Los Angeles in March, 1942.

c. All evidence of sales during April and May, 1943, made by Victory Produce Company, which was not a party to the action.

d. All evidence introduced by appellee showing methods by which "country shipper" determines his maximum ceiling prices under the provisions of Maximum Price Regulation 271, as amended.

Dated, April 6th, 1945.

EDWARD M. RASKIN and
LOUIS LERNER

By: Edward M. Raskin

Attorneys for Appellants, Jim Jung and Marty Sherman

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 11, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER

Whereas, the cost entailed in printing plaintiff's Exhibits 1 and 2 as part of the printed record on appeal is burdensome, expensive and unnecessary, and

Whereas, said Exhibits are contained in the Clerk's transcript on appeal herein and they may be physically examined by the above entitled Court when necessary with the same force and effect as if printed as part of the record, and

Whereas, the parties to this appeal feel that the issues in the above entitled case may be adequately examined and decided by the above entitled Court without the necessity of printing said Exhibits as part of the record on appeal herein,

It Is Hereby Stipulated by and between Appellants and Appellee, through their respective counsel, that this Court order that the printing of plaintiff's Exhibits 1 and 2 as part of the record on appeal be dispensed with.

EDWARD M. RASKIN
Attorney for Appellants

ARLINE MARTIN
Attorney for Appellee

It Is So Ordered:

CURTIS D. WILBUR
Circuit Judge

[Endorsed]: Filed Apr. 13, 1945. Paul P. O'Brien, Clerk.